AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 281

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

ANN WARNER ET AL., HEIRS-AT-LAW OF JOHN G. WARNER, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 14, 1900.
WRIT OF CERTIORARI AND RETURN FILED JULY 10, 1900.

(17,783.)

(17,763.)

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INDEX.

	Page.
Original bill	1
Amendment to bill	19
Answer	20
Agreement of June 7, 1876, for sale of dredge-boats, &c	36
Ordinance No. 3479	42
Ordinance No. 3539	43
Appraisements of T. S. Hardee	43
Copy of drainage warrant	50
Petition for writ of certiorari in case No. 172, of October term, 1899	51
Assignment of errors filed in case No. 172, of October term, 1899	74
Petition for writ of certiorari in this case	80
Answer of respondent	90

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Page
Transcript filed with petition in this case 92
Caption 92
Decree on mandate from United States circuit court of appeals 93
Mandate from United States circuit court of appeals 95
Motion and order making heirs of Warner parties 97
Copy of judgment of civil district court in succession of Warner 97
Decree on mandate of United States Supreme Court 99
Mandate from United States Supreme Court 99
Master's report 102
Master's supplemental report on defendant's exceptions 106
Exceptions to master's report 108
Testimony before master 109
Testimony of S. D. Moody for complainant 110
Robert C. Shortridge for complainant 116
Clark Steen for complainant 117
S. D. Moody for complainant (recalled) 119
James Jackson for complainant 121
Juste Fontaine for defendant 123
Claim of Frank N. Butler *et al.*, filed before master 125
Appearance of Mrs. Frank N. Butler, executrix 126
Claim of F. J. Gasquet, filed before master 127
John Crossly & Son, Limited, filed before master 128
Wilder & Co., filed before master 130
Mrs. Lytle, tutrix, filed before master 131
Suffolk National Bank, filed before master 132
John J. Donaldson, filed before master 132
Schedule 1—Assessment of drainage taxes against the city 133
Schedule 2—Assessment of drainage taxes against private property 134
Motion to file and record mandate of Supreme Court 135
Complainants' additional offering of evidence 136
Defendant's offer of evidence 137
Exceptions to report of master 143
Agreement changing exceptions to master's report 145
Final decree 145
Agreement as to transcript 148
Order allowing appeal 149
Assignment of errors 150
Appeal bond 152
Certificate of clerk 153
Agreement as to supplemental record 153
Amendment to petition 155
Exception and answer 156
Judgment on mandate of United States circuit court of appeals awarding a new trial 157
Mandate 157
Judgment 158
Clerk's certificate 158
Cost bills of clerk of United States circuit court, clerk of United States circuit court of appeals, and of the United States marshal 159
Clerk's certificate 160
Agreement as to additional record 160
Proceedings had in United States circuit court of appeals 161

26041

Page
Argument and submission 161
Decree of the court 161
Petition for rehearing 162
Order denying rehearing 164
Opinion of the court 164
Certificate of clerk 165
Writ of certiorari 165
Stipulation as to return 165
Return to writ of certiorari 166
Stipulation designating record for printing 166

Circuit Court of the United States, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350. In Equity.

Bill in Equity.

Filed Nov. 26, 1894.

To the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

John G. Warner, a resident of the city of Brooklyn and a citizen of the State of New York, brings this his bill on his own behalf as well as on behalf of all other parties holding obligations of the same nature and kind as your orator, who may intervene for their interest herein and may contribute to the costs, expenses and counsel fees incurred in this suit, whose names are numerous and are unknown to your orator, against the City of New Orleans, a municipal corporation of the State of Louisiana and a citizen of said State.

And thereupon your orator complains and says, that by act No. 165 of March 18th, 1858, the legislature of said State provided for the leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, the boundaries whereof are fully set forth in said act—which is made part hereof—and said lands were divided into three draining districts, which were respectively designated, as the first, second, and third draining districts, to which, pursuant to a subsequent act of said legislature, a fourth draining district was added—which will be noticed hereafter—that for the purpose of carrying out the provisions of said act, it was provided by the second section thereof, for the appointment of board of draining commissioners for each of said districts, who were by the fourth section of said act invested with all the rights and powers necessary to drain said several draining districts, and to that end were allowed at all times to enter the lands within said districts, to place engines and machinery thereon to dig drains, to make necessary embankments, and levees, and generally to do all things necessary to be done in draining and reclaiming the lands within said districts, and said boards of commissioners by the fifth section of said act were authorized to sue and be sued.

2. And your orator further shows that by the 7th section of said act said boards of commissioners were each empowered to levee, drain and reclaim in their respective districts as follows: whenever either of said boards of commissioners were ready and prepared to drain their respective sections or districts, such board was directed to cause a plan thereof to be made, accurately designating the limits of the section or district to be drained as far as possible, the subdivisions of the property therein contained and the names of the proprietors, also the dimensions and directions of the canals to be dug, and the

place where the steam-engines would be placed, which plan or plans were to be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted in French and English, in two newspapers, once a week for four successive weeks, announcing that said boards of commissioners would proceed to drain such sections, and describing the place where the plan was deposited, accurately defining the limits thereof, and indicating as nearly as possible the time when the draining thereof would be completed, and the possible cost of the work; and said section further provided, that after the publication aforesaid, that said boards of commissioners should apply by petition to one of the courts in said parish of Orleans for the portion of the section or district lying within the limits of said parish, and to the district court in the parish of Jefferson for that portion of the section or district lying within the limits of said parish, which court or courts were directed upon due proof having been made of the publications and notices aforesaid, to decree, that each portion of the property situated within said limits was subject to a first mortgage, lien, and privilege in favor of such boards of commissioners for such an amount as might be assessed upon such section or district, and interest thereon, at six per cent. per annum from demand thereof, which decree of the district court of the parish of Orleans was directed to be recorded in the office of the recorder of mortgages for said parish, and the decree of the district court for the parish of Jefferson was directed to be recorded in the office of the recorder of said parish, which lien, privilege, and first mortgage, it was further declared by said section should take precedence over all mortgages, liens, privileges, whatsoever, whether tacit, conventional, legal or judicial, and should attach to the property until the amount assessed and the interest thereon should be fully paid.

3. And your orator further shows that by the eighth section of said act said boards of commissioners were each within their respective districts or sections, given the right and authority and power to levee such uniform assessment or assessments upon the superficial or square foot of lands situate within the draining section or district of such board to defray the expense of the construction of the levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of said act, as applicable to its particular district, which assessment was to be collected from time to time, as the wants of such boards might require; and by the ninth section of said act it was provided that for non-payment of said assessments, judgments should be recoverable therefor before any court of competent jurisdiction and the lands assessed should be sold according to law.

4. And your orator further shows that an act supplementary to the above act, No. 165, approved March 18, 1858, was duly passed by the legislature of Louisiana, and approved March 17, 1859, being No. 191 of that year, by which it was enacted in the first section thereof, that *that* to enable said boards of commissioners to carry into effect the provisions of said act No. 165, approved March 18

1858, and to commence the works therein contemplated, that each of said boards of commissioners should have power and authority to issue bonds in the sum — $500, having not more than thirty years to run and bearing interest, not exceeding 8 per cent. per annum, to be designated "draining bonds," which were not for any one district to exceed $350,000; and by the second section of said supplementary act, it was provided that it should be the duty of said boards of commissioners, upon issuing the bonds aforesaid, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situate within the draining district or section of each board or boards, in accordance with the provisions of the aforementioned original act, approved March 18, 1858, and fix and apportion the amount to be paid yearly, by the owners of said lands in order to pay the annual interest on said bonds as might mature, and the manner of redeeming such bonds was provided for in other sections of said act, as will appear from a reference thereto, which is made a part hereof.

5. And your orator further shows that the legislature of the State of Louisiana, by act approved March 1, 1861, being No. 57 of that year, and entitled "An act to provide for the collection of the assessments for drainage, under the acts of March eighteenth, eighteen hundred and fifty-eight, and the supplementary act thereto of March seventeenth, eighteen hundred and fifty-nine," enacted that the amounts of assessments, which the boards of the several draining districts were authorized to affix and apportion, to be paid yearly by the owner or owners of the land within said districts, in order to pay interest on the bonds issued, or to be issued by said boards of commissioners, and such bonds as might mature by virtue of the second section of said supplementary act No. 191, approved March 17, 1859, should be collected and sued for as follows, to wit: as soon as any assessments had been made notice thereof should be given, a copy thereof should be filed in the third district court of New Orleans for all the assessments on the property within the limits of the parish of Orleans, and in the third judicial district court sitting at Carrollton, for assessments made on property within the limits of the parish of Jefferson, and on which tableau of asssessments thus to be filed the property assessed should be set forth with the amounts assessed, and the names of the owners thereof, if known, and if the owners' names were unknown, then it should be so stated in said assessment-roll that the property assessed belonged to owners unknown; that a petition should be filed with said assessment-roll praying for an order that all persons whom it might concern do show cause within thirty days from the first publication of said order, if any they had, why said assessment-roll should not be approved and homologated; that said order thus rendered should be published in the French and English languages at least twice a week for thirty days, in one newspaper published in New Orleans, as to the order of the third district court of New Orleans, and in one newspaper published in the parish of Jefferson, as to the order of the third judicial district court sitting at Carrollton, and that after said publications the said courts should, on motion of counsel of

said boards of commissioners, approve and homologate said assessment-rolls, which should be a judgment against the property assessed and the owners thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceedings, and that the court should at the same time and in the same judgment order the delinquent parties to pay 10 per cent. in addition to the amount assessed, to pay costs and counsel fees.

6. And your orator further shows that afterwards, to wit: in the year 1871, the legislature of the State of Louisiana, by act No. 30 of that year, authorized and empowered the Mississippi & Mexican Gulf Ship Canal Company, a corporation then existing and domiciled in the city of New Orleans, to excavate drainage canals, and build protection levees within the limits of New Orleans and Carrollton, on certain terms and conditions expressed in said act, and by the second section thereof said company was authorized and empowered to dig a canal and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city and near the shore of Lake Pontchartrain, the exact location of said canal and levee, and of all canals to be dug and levees to be built by said company to be designated and fixed by the board of administrators of said city of New Orleans, and by the fourth section of said act, said Mississippi & Mexican Gulf Ship Canal Company was authorized to build a canal and protection levee below the city of New Orleans to connect the lower end of the protection levee along the lake with the Mississippi river, of a sufficient size to fully protect the city from overflow, and on a line to be designated by said board of administrators of said city, and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by said board of administrators, the object of these two canals and protection levees being the protection from overflow, of the area between the Mississippi river, Lake Pontchartrain, and said lower and upper protection levees; and by the fifth section of said act said canal company was authorized to dig all the smaller canals required for the drainage of New Orleans and the lands in the rear of the city, of the dimensions of ten feet or more in width; and by the sixth section of said act, it was the duty of said board of administrators of the city of New Orleans, immediately after the passage of said act, not only to locate the lines of the canals and protection levees specified in the various sections of said act, but they were also required to build and run all pumps and drainage machines necessary to lift the drainage water from the said canals over into Lake Pontchartrain and keep the water in said canals in process of excavation as far as practicable at a proper level for the work of excavation, and at the same time assist the draining of the adjacent lands; and by the eighth section of said act it was made the duty of the city surveyor of New Orleans, or an engineer appointed by said board of administrators for the purpose, to examine the work done by the said Mississippi & Mexican Gulf Ship Canal Company during each month, and upon measurement of the width and depth of the canals, or parts of canals, dug and protection levees built to certify as to the cubic yards ex-

cavated and the number of cubic yards of protection levees built during said month, and that it should be the duty of the administrator of accounts on the presentation to him of said certificates of the city surveyor or engineer appointed as aforesaid, to draw a warrant or warrants on the administrator of finance in payment of the work so done, at the rate of fifty cents per cubic yard for excavation, and fifty cents per cubic yard for the protection levees built, the said warrants to be of such denominations as might be required by the president of said company, and these warrants it was the duty of the administrator of finance to pay on presentation to him in case there was any fund in the treasury to the credit of the said Mississippi & Mexican Gulf Ship Canal Company, but should there not be sufficient funds to cash said warrants, then said administrator of finance was by said act required to endorse upon the same the date of presentation, after which date the said warrant or warrants bore interest at the rate of 8 per cent. per annum until paid; and by the ninth section of said act it was enacted that in order to provide funds for the payment of work to be done by the said company, that the three boards of commissioners for the draining districts of New Orleans and Jefferson established under acts of March 18th, 1858, March 17th, 1859, and the several acts amendatory thereof, and any and all other person or persons or corporations who might have been in possession, should transfer to the board of administrators of New Orleans, all money, assessments, and claims for drainage in their hands or under their control, all titles to real estate, all books, plans, tableaux and judgments in favor of commissioners, the office furniture of said drainage commissioners, a true statement of the claims of drainage commissioners against the city of New Orleans to be adjudicated and settled out of the money collected by the city of New Orleans and pertaining to said drainage districts, and that the board of administratrators of New Orleans should be and were *were* thereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of said several drainage districts or any other corporation charged with the duty of draining and leveeing within the limits of the city of New Orleans and Carrollton and the said board of administrators were directed to collect from the holders of property within said drainage districts the balance due on the assessments as shown by the books of the first, second, and third drainage districts under acts of March 18, 1858, that of March 17th, 1859, and the several supplementary and amendatory acts thereto, and which assessments were thereby confirmed and made exigible, and further, to make assessments of two mills per superficial foot in those parts of the drainage districts as existing and created by said acts of March 18, 1858, and March 17th, 1859, and amendments thereto, and on such other lands as should be brought within the protection levees contemplated by said act 30 of 1871, where no assessments had been made, and to execute and enforce the same as provided by the several acts of the legislature creating and regulating said boards of drainage commissioners, and that all money received by said boards of administrators from the said commis-

sioners of drainage, the collection of claims for drainage then due, from the collection of assessments, and from any of the sources of revenue contemplated by the provisions of the aforesaid section nine, should be placed to the credit of said Mississippi & Mexican Gulf Ship Canal Company, to be held as a fund to be applicable to the drainage of New Orleans and Carrollton (which was a virtual consolidation of all of said districts and said additional territory brought within said protection levees), in accordance with the provisions of said act, and that all property not money, so received, should be held in trust for the payment of said Mississippi & Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage, provided, that all the rights and powers and facilities possessed and enjoyed by said boards of administrators of New Orleans relative to drainage should be so construed as not to conflict with the rights, facilities acquired by said company in excavating canals and building levees, as stipulated in the various sections of said act; and the twelfth section provided that said act should be favorably construed so far as to favor all the purposes and objects of said act, and the operations and provisions thereof, all of which will more fully appear by reference to said act No. 30 of the year 1871, which is made a part hereof.

7. And your orator further shows that on the 7th of February, 1872, under and pursuant to said act 30 of 1871, said board of administrators of the city of New Orleans adopted an ordinance creating the fourth drainage district, which embraces those other lands not embraced within the first, second and third draining districts, but were brought within the protection levees contemplated by said act where no assessments had been made or levied, as will more fully appear by reference to a copy of said ordinance herewith filed and made part hereof and marked "ordinance No. 1359."

8. And your orator further shows that said boards of drainage commissioners were duly appointed, qualified and entered upon the duties imposed upon them by the various acts of the legislature hereinbefore referred to, for the first and second drainage districts, and pursuant to said acts, respectively prepared, filed and deposited in the office of the recorders of mortgages of the parishes wherein the land to be drained was situated, their plans, designating the lands therein to be drained, the subdivisions of the property therein contained, the names of the proprietors, the dimensions and directions of the canals and the places where the engines were to be located; and after due publications of the notices as required by said acts that said commissioners would proceed to drain said lands, naming the place of deposit of said plans and defining the limits of the lands to be drained, and including as nearly as possible the time required for the completion and the probable cost of the drainage; and on the petition of said commissioners, decrees were rendered by the district courts designated by said acts, that such portion of said property within the limits of the section or district to be drained, and exhibited by the plans was subject to a first lien,

privilege, and mortgage, in favor of said commissioners for such amounts as might be assessed upon said property for its part of the costs of drainage, with interest thereon *with* six per cent. per annum from demand, and subsequent like liens, privileges and mortgages were decreed at the suit of the board of administrators of New Orleans in said third and fourth drainage districts, said decrees, the courts rendering the same, the dates of rendition and the title of the proceeding are as follows, to wit:

The judgment "In the matter of the commissioner- of the first draining district, praying a decree of mortgage privilege," etc., rendered by the third district court of New Orleans in suit No. 16269 on the docket of that court on the 24th day of August, 1861; the judgment "In the matter of the commissioners of the second draining district praying for a decree of mortgage privilege," etc., rendered by the third judicial district court of Jefferson in suit No. 1938, on the docket of that court rendered and signed on the 29th of April, 1861; the judgment "In the matter of the board of commissioners of the second draining district praying," etc., rendered by the third district court of New Orleans, in suit No. 15846, on the docket of said court rendered and signed on the 9th day of February, 1861; the judgment "In the matter of the city of New Orleans praying for a decree of mortgage privilege," etc., upon property in the third draining district (said city acting under said act 30 of 1871), duly rendered by the eighth district court, parish of Orleans, being No. 7482 on the docket of that court, on the 4th day of May, 1872; and the judgment "In the matter of the board of administrators praying for a recognition of mortgage and recovery of assessments in the fourth draining district,"—said board of administrators herein also acting under said act 30 of the year 1871—rendered by the superior district court, parish of Orleans, in suit No. 807 on the docket of said court, on the 29th day of January, 1873, and signed on the 3d day of February, 1873, copies of judgments are herewith filed and marked Exhibits "A," "B," "C," "D," and "E," and which were respectively recorded in the mortgage office where the land to be affected thereby was situated, as follows, to wit: 1st drainage district, in the mortgage office for the parish of Orleans, April 17, 1872; and April 6, 1882; second draining district, parish of Jefferson, April 29, 1861, and December 12, 1871; second draining district, parish of Orleans, April 11, 1861, and December, 1871; third draining district in the mortgage office for the parish of Orleans, May 11, 1872, and April 6, 1892; and in the fourth draining district, in the mortgage office for the parish of Orleans, February 8, 1873.

9. And your orator further shows that under the authority conferred by the aforesaid acts of the legislature the board of commissioners of the first draining district on the 12th day of September, 1861, levied an assessment of 3.3 mills per superficial foot on the lands within said district, to pay the cost of drainage directed by said acts; that on the 11th of March, 1861, the board of commissioners of the second drainage district levied an assessment of two mills per superficial foot on the lands of said district to pay the cost

of drainage of said lands under the same authority; that on the 11th of June, 1872, the board of administrators of the city of New Orleans, then vested with power to make assessments by virtue of said act 30 of 1871, levied an assessment of two mills per superficial foot on all lands within said third district to pay the cost of draining said lands; and on or about the 20th of November, 1872, the said board of administrators, in the exercise of the authority conferred by said act 30 of 1871, levied an assessment of two mills per superficial foot on lands within the aforesaid fourth draining district, to pay the cost of draining said lands, all of which will more fully appear by reference to the resolutions of said boards of commissioners and ordinances of the common council of said city of New Orleans, copies of which are herewith filed and made part hereof, and marked respectively "assessment 1," "assessment 2," "assessment 3" and "assessment 4."

10. And your orator further shows that the tableaux required by the provisions of said act No. 57 of the year 1861, exhibiting the amounts assessed for such drainage, the names of the owner- of the lands as known, and where unknown stating the owners were unknown, were duly filed in the courts hereinbefore mentioned in accordance — the provisions of said act, and on motion and after due publication of said orders that all persons concerned show cause why said assessment-rolls should not be approved and homologated, said tableaux or rolls of assessment were duly homologated and approved by judgments of said courts, which by the terms of said act No. 57 of 1861 were and are judgments against the aforesaid lands as well as the owners thereof, for the amounts assessed and 10 per cent. costs and counsel fees and said judgments, the titles of the proceedings, the courts rendering the same, and the dates of rendition are as follows: "In the matter of the commissioners of the first draining district," etc., No. 17828, third district court, parish of Orleans, homologating the assessment-rolls for said district, for the first instalment of 10 per cent. thereof, rendered March 11, 1863, and No. 25935, superior district court for the parish of Orleans, for the remaining nine instalments, from the second to the tenth, both inclusive, was rendered March 21, 1874.

"In the matter of the commissioners of the second draining district, praying," etc., No. 1938, the judgment homologating the assessment-roll of said district, above Toledano street, New Orleans, was rendered by the third judicial district court for the parish of Jefferson on the 15th and signed on the 23d March, 1869.

"In the matter of the commissioners of the second draining district, praying," etc., No. 15846, the judgment homologating the assessment-rolls of said district below Toledano street, New Orleans, was rendered by the third district court for the parish of Orleans on the 11th and signed on the 16th November, 1868.

"In the matter of the city of New Orleans, praying for the homologation of assessment-roll," etc., for the third draining district, the judgment homologating said assesment-rolls was rendered on the 8th and signed on the 13th day of November, 1872, by the eighth district court of the parish of Orleans.

"In the matter of the board of administrators, praying for a recognition of mortgage and recovery of assessments in the fourth draining district," No. 807, the judgment of homologation of the assessment-rolls for said district was rendered on the 15th and signed on the 18th of March, 1873, by the superior district court of the parish of Orleans, all of which judgments are specially referred to for greater certainty, and copies of the same are made part hereof and are marked respectively, "homologation 1," "homologation 2," "homologation 3," "homologation 4" and "homologation 5;" all of said courts so rendering said judgments, outside of said third district court, having become possessed of jurisdiction over said matters under authority conferred on them by the legislature of the State passed subsequent to said act No. 57 of 1861. And for the revival of all of which judgments, as a matter of excessive precaution and not because the same were necessary proper proceedings were in proper time taken in the proper courts and are still pending therein.

11. And your orator further shows that said board of administrators complied with said act 30 of the year 1871, and took possession of all the money, rights, privileges, properties and powers conferred on them, and became possessed of all the means necessary to carry out the objects of the statutes aforesaid and provide for the payment of all drainage warrants that might be issued under said act 30 of 1871 and that the amount of assessments handed over to said city of New Orleans, in the 1st and 2d draining districts was $790,621.42, and the amount of assessments levied and reduced to judgment at the suit of the city of New Orleans in said 3d and 4th draining districts, after she came in control under said act No. 30 of 1871, was $909,915.74, making a total of $1,699,637.16 of which there was assessed against the city of New Orleans on streets and squares as follows: 1st district, $223,110.60; 2d district, $199,885.47; 3rd district, $207,441.46; 4th district, $65,956.77, and on which assessments there had been collected from individuals by said city of New Orleans, between the time she took charge as aforesaid and the 7th day of June, 1876—the date of the sale from Van Norden and said canal company hereinafter referred to—in cash $78,748.51, and $151,174.18 in drainage warrants, paid in pursuance of an ordinance No. 2460 hereto annexed and made part hereof, leaving outstanding and due on the books and records a balance of $1,469,714.47, including said sums due by the city of New Orleans on said assessments levied on her streets and squares as aforesaid.

12. And your orator further shows that on the 22nd day of May, 1872, said Mississippi & Mexican Gulf Ship Canal Company, by act before Andrew Hero, notary public, for a good and valuable consideration therein expressed, did assign, transfer and set over to Warner Van Norden all and singular the right, title and interest, claim and demand of said canal company in and to the privileges and advantages granted to it under the aforesaid act No. 30 of 1871, as will more fully appear by reference to a copy of said act herewith filed and made part hereof; and on the 22nd day of November, 1872, said canal company by another act before the same notary,

for a valuable consideration therein expressed, did sell and deliver unto said Van Norden all of its dredge-boats, derricks, flat-boats and other property used in dredging, as will more fully appear by reference to a copy of said act of sale herewith filed and made part hereof.

13. And your orator shows that from the time said board of administrators took possession and charge in June, 1871, pursuant to said act 30 of 1871, a vast amount of drainage work was done by said canal company and said Warner Van Norden, transferee thereof; twelve miles of old canals were widened and deepened, and thirteen miles of new canals were dug, and a corresponding amount of protection levees were built, and in the doing of which over 5,000,000 cubic yards of earth were handled, and the work so done by said company and said Van Norden, transferee, was in all respects conformable to the acts of the legislature and the designs of said board of administrators, who duly approved and accepted all work done, and was adequate to secure said proposed drainage, and only required the completion of a gap on the shore of Lake Pontchartrain, and the placing in position of the pumping engines on said lake shore—which it was the duty of said city of New Orleans to do under said act 30 of 1871 to complete the entire system.

14. And your orator further shows that by act No. 16 of the legislature of Louisiana, approved March 24, 1876, and made part hereof, the city of New Orleans was authorized and empowered to contract with said Mississippi & Mexican Gulf Ship Canal Company and said Van Norden, as transferee thereof, for the purchase of its said transferee's rights, franchises, tools, implements, machines, and boats and apparatus, the purchase price to be paid in drainage warrants, payable out of drainage taxes imposed under the various acts of the legislature hereinabove set forth, and after due appraisement, on the 6th day of June, 1876, said purchase was made by said city by notarial act (a copy of which, as well as of an inventory of the property sold, and the ordinance under which said inventory was made, are hereto annexed and made part hereof, and marked "transfer 1" and "inventory 1," and ordinance No. 3479, A. S.), the city receiving from said company and said transferee, said boats, machinery, implements and apparatus of great value, for which it agreed and bound itself to pay in drainage warrants $300,000.00 which were delivered to said Van Norden transferee as aforesaid, pursuant to ordinance No. 3539 A. S. copy of which is annexed and made part hereof, and of which your orator is now the owner and holder of three, of $2,000 each, by him endorsed (a copy of one of which is also annexed and made part hereof) all dated June 6th, 1876, upon which this suit is brought, as well as upon the assignment, transfer and subrogation of said Warner Van Norden to your orator, of all his right, title and interest in and to said warrants, as well as of each, any and all right or rights of action which he had or has against said city of New Orleans arising in his favor out of said act of sale of said June 7th, 1876, or the action of the city of New Orleans thereunder by reason of its failure to collect said drainage taxes out of which said warrants given for the purchase

aforesaid were payable, or by reason of the failure of the city of New Orleans to complete said drainage work, to the end that said taxes might all be collectible, so as to pay said warrants given for said purchase, or for any other reason, of which a copy is herewith filed and marked "assignment 1," and he brings this suit not only for himself, but for such other holders of said drainage warrants, given for the purchase aforesaid, as may under the invitation hereinbefore extended make themselves parties to this suit.

15. And your orator further shows, that said Van Norden, at the time of parting with said drainage warrants in the year 1876, as well as at the time of making said assignment and transfer marked "assignment 1" was, and now is at the time of bringing this suit, a citizen of the State of New York and could bring this suit in this hon. court.

16. And your orator further shows that said act of the legislature of Louisiana of February 24, 1876, being No. 16 of that year, providing for the payment of the purchase price of said dredge-boats, tools and implements, by the issuance and delivery of drainage warrants, payable out of drainage taxes, was a new destination of said taxes by the legislature of the State as they then stood, which could not be diverted until said drainage warrants, so given as aforesaid, were fully paid, and placed said taxes beyond any claim that might be urged against them by the city of New Orleans, or any other party or person whomsoever, and especially as said city became the absolute owner of said dredge-boats, franchise and implements without paying any of her own money or property, or giving any personal obligation therefor.

17. And your orator further shows that after said purchase said city of New Orleans alone, became possessed of the sole power, authority, as well as the necessary tools and outfit to complete the contemplated system of drainage, and in fact construct and complete any system of drainage, and had the duty cast upon her to complete said system, or build and complete some other system of drainage, but from the very date of said purchase in June, 1876 (and notwithstanding said drainage work had, from the very commencement thereof by said canal company in 1871, and the prosecution thereof by Van Norden as transferee of said company, from May, 1872, been proceeded with, with great vigor and over two-thirds thereof had been completed) said city of New Orleans ceased all work on said system, and never thereafter commenced or prosecuted any other, but sold some of the boats and machinery so purchased as aforesaid, diverted the proceeds of taxes from other purposes than the payment of drainage warrants, allowed other of said boats to rot and sink unused, and all notwithstanding all were in a first-class condition when received from said vendor, with all the outfit in duplicate parts, so that if any was broken or gave way a counterpart was on hand to take its place, and which with reasonable care would have been useful for ten years from the date of said purchase, and thus rendered herself incapacitated for the completion of the drainage work aforesaid or for any work of drainage whatsoever, and allowed the canals dug by said company and its

transferee to fill and remain filled with filth and sediment, and thus became useless and worthless, and in fact destroyed the vast amount of work already done to a very large extent.

18. And your orator further shows that ever since said purchase by said city she has done nothing to compel or enforce the collection and payment of drainage taxes, and but one execution has been issued on said drainage-tax judgments since June, 1876, and when this was enjoined by a preliminary injunction, no steps have ever since been taken to have said injunction tried or disposed of, and in fact said city has done nothing toward the collection of said taxes but keep an office open in the city hall where the agent of Van Norden might try to induce drainage-tax debtors, by persuasion to pay their taxes, where your orator has been informed some taxes have been paid but the amount thereof is unknown to your orator, and the same have never been accounted for, and finally after this system of inaction and supineness, said city of New Orleans on the 5th day of April, 1881, adopted by its common council an ordinance, and had the same published in the daily press of New Orleans, instructing its mayor to issue, and in pursuance thereof he did issue and publish his proclamation advising drainage-tax payers not to pay their taxes (which had a most disastrous effect upon the payment thereof), and by reason of her conduct in not completing the said system of drainage or *and* because thereof, and because she had not adopted any other system of drainage, to drain the land whereon said assessments were imposed and remained unpaid, the supreme court of Louisiana, in the case of Davidson *vs.* New Orleans, in March, 1862 (34 La. Ann., p. 170 to 178) decided said drainage taxes could not be enforced and collected, and this decision, from the date thereof, has become the settled jurisprudence of the State, and been the basis of many suits in the courts of Louisiana, in which large amounts of drainage taxes have been erased and canceled, and all the balance thereof remaining unpaid have become of little or no value; and after the rendition of said Davidson decision said city of New Orleans, on the 15th of May, 1883, in the further prosecution of its purpose to destroy said drainage taxes and dissuade those owing the same not to pay the same, by a report of a committee of its council, duly published, pointed out to the drainage-tax payers how under said Davidson decision they might avoid payment thereof, to wit, by bringing proceedings against said city as trustee of said drainage taxes, and alleging that the drainage work (which it was the duty of the city of New Orleans to complete) had not been completed, and that because thereof said drainage taxes could not be enforced, which suggestion and programme so put forth by said city while trustee of said fund and the collection thereof, has ever since been largely adopted and enforced and very large amounts of drainage taxes have been ordered erased and have been erased and lost in consequence thereof, that when said proceedings were brought said city of New Orleans made no defence whatever, but in accordance with the determination to destroy said fund, never called a single witness to show the value of the work done and the benefits resulting therefrom, and of all of

which she had full knowledge, but of the exact extent of said proceedings and the exact amount of drainage fund thereby destroyed your orator has no exact knowledge, except of one case, to wit, the proceedings instituted to cancel and erase the drainage taxes on a portion of the land known as the Foucher tract in the 2d drainage district, to wit, that part thereof lying on the swamp side of St. Charles street between Fabourg Greenville and Fabourg Burtheville, in the suit entitled C. E. Girardy *et al. vs.* Heirs of William Henry, No. 23315 on the docket of the civil district court, where the city of New Orleans, although a party to said proceedings, and having full knowledge of the benefits conferred on said land and other land in the vicinity by said work of drainage, and that the same was drained never called a single witness to prove the fact but suffered the matter to go by default, and in consequence thereof on the 12th day of June, 1889, the court ordered the drainage taxes assessed against said land amounting to $11,532.00 with 6 per cent. interest per annum from December 7, 1877, and 10 per cent. attorneys' fees and costs to be erased and canceled from the drainage records and the mortgage office, which has since been done and said amount has been wholly lost to said drainage fund.

19. And your orator further shows that said city has in other ways and by other means, the details of which are at present unknown to your orator destroyed said drainage fund and discouraged, and advised against the payment of said drainage taxes, until now, as far as the courts of Louisiana are concerned, the same has become uninforcible and worthless to the holders of drainage warrants given for the purchase of the aforesaid dredge-boats, tools, implements and franchise, which said city, from the date of said purchase up to the present time, has not paid for in whole or in part in drainage taxes or otherwise provided any means for the payment of said warrants, or offered any restitution of said property, and all in express violation of an express covenant contained in said act of sale "not to obstruct or impede, but on the contrary to facilitate by all lawful means the collection of said drainage-tax assessments, until said warrants should be paid in full."

20. And your orator further shows that on some occasions said city has claimed said drainage taxes as her own property and been allowed the full benefit thereof in the payment of her own debts, and especially in suit No. 2036, civil district court, and No. 2447, late superior district court for the parish of Orleans, wherein, being sued as indebted to the commissioners of the city park in a large sum of money, she claimed said sum so sued for should be credited with drainage taxes amounting to $25,725.96 assessed against another portion of said Foucher tract in said second drainage district lying between said Fabourg Greenville and Fabourg Burthville aforesaid, and between St. Charles street and the Mississippi river, which credit was allowed to said city in discharge of her own indebtedness, to the expense and loss of said drainage fund, and for which with interest at 6 per cent. per annum from the date of allowance she should account to the holders of said drainage warrants given for said purchase.

21. And your orator further shows that he is advised that said defendant now claims that she has not in her possession any funds realized from drainage-tax assessments, against other property than the streets and property for which she is liable, and that none of the taxes assessed on property of private individuals is now susceptible of collection.

22. And your orator further shows that the plan for draining and reclaiming the land aforesaid, as provided for in said act 30 of 1871, and as supplemented by the board of administrators of said city of New Orleans under the authority given, and the duty imposed on them under said act, and which they neglected and destroyed as aforesaid, was, first, to surround the territory embraced in said four drainage districts with immense levees to prevent any water from flooding the same from without, as follows: On the south by the levee on the bank of the Mississippi river; on the east by a lower protection levee; on the north by the lake-shore protection levee (which was to be not less than 100 feet wide at its base, and of sufficient height to completely protect said land from overflow from the lake); and on the west by an upper protection levee; and, second, the plan for removing all water and drainage that might accumulate within the territory so protected from overflow as aforesaid, was, *to* immediately inside of said protection levees above or on the west, and below or on the east, to dig immense canals leading directly into another immense canal to be dug immediately inside of said lake-shore protection levee on the north, which was to be not less than 65 feet wide and 15 feet deep, which was to serve as a reservoir canal, from which the drainage emptying therein was to be pumped into said Lake Pontchartrain as hereinafter stated; and into said reservoir canal other canals of large size were *lead* parallel with said canals inside of said upper and lower protection levees, and at proper distances, according to the topography of the land, other and smaller canals were to be dug at right angles and connecting with and emptying in said reservoir canal inside of said lake-shore protection levee.

23. And your orator further shows that said levee on said bank of the Mississippi river was, and ever since the year 1871 has been sufficiently high and strong to protect said enclosed territory from any overflow from said river front and that the land on said river front to Claiborne street in said city (about one-third of the distance from said river to said Lake Pontchartrain), descends or falls towards said lake about 16 feet, while the land at said Claiborne street is only one foot higher than it is at said lake, and that to provide for this condition of things the drainage from the levee on said Mississippi River front was over the surface of the ground, and in the street gutters to Claiborne street aforesaid, where the aforesaid right-angle canals running east and west, and emptying into said upper and lower protection canals were to be dug, and at proper distances continued towards said reservoir canal; and the other canals which *lead* northwardly from said Claiborne canal and parallel with said upper and lower protection canals and emptying into said reservoir canal were to be begun at or near said Claiborne Street canal, and

were to descend from said point gradually increasing in depth until they reached said reservoir canal at a depth of fifteen feet, thus making a complete and continuous descent or fall for drainage from the levee on the Mississippi river in front to the bottom of said reservoir canal on the inside of said lake-shore protection levee in the rear, of thirty feet or more; and said reservoir canal was at all times to be kept empty and free for the flow of drainage therein, by four immense pumping engines to be built and run by the city of New Orleans (but not from drainage-tax collections), on said lake-shore protection levee over which they were to throw said drainage into said Lake Pontchartrain; and your orator avers that said plan or system of drainage was well devised, wise, complete and sufficient, and had the endorsement of the ablest engineers in the country, and if carried out and completed by said city of New Orleans after the purchase aforesaid, would have protected the lands embraced within said plan from overflow from without, and would have easily, quickly and completely removed all the drainage from within the levees provided for thereby, and rendered the land fit and useful for either agricultural, residence, and business purposes, and made the same of many times the value of all drainage taxes imposed thereon, and said taxes themselves collectible and available for the payment of the drainage warrants given for the purchase aforesaid.

24. And your orator further shows that at the time of said sale by said Van Norden and said canal company to said city of New Orleans said drainage assessments then uncollected—and all exclusive of the taxes imposed on swamp land in the first and second drainage districts, which had been settled for prior to said purchase and sale—amounted to the said sum of $1,469,715.41 and that after said sale and purchase said city had not only the power and authority, the machinery and outfit, to have completed said system of drainage, or to have adopted and completed any other system, that would have drained said lands and made them available for the payment of the drainage warrants given for the purchase aforesaid, but she had in addition to all this, from the very date of said purchase, an unexhausted and unrestrained power of taxation under which, by a tax on all the property within the city of New Orleans, she could have supplied herself with more than sufficient means to have completed said system, or any other system, but in violation of her duty and in utter repudiation of her obligations, she did at once abandon all pretence of draining in any way whatever, and destroyed the very source from which she had bound and obligated herself to pay the warrants given for said purchase, sometimes pretending that said drainage taxes were illegal and unconstitutional by reason of various acts of the legislature of the State, to wit: Act No. 48 of the year 1877, excluding certain lands from all liability for drainage taxes, and canceling and annulling all judgments for drainage of said lands, and all legal proceedings pending therefor, act No. 67 of the year 1877 declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed; and section 42 of act

20 of the year 1882, which undertook to abolish all laws providing for drainage, and the drainage-tax assessments and judgments imposed thereunder, all of which your orator avers were illegal, null and void because repugnant to the Constitution of the United States, and especially article 1, section 10, and the 14th amendment of that instrument, prohibiting all legislation impairing the obligation of contracts and protecting the rights of property, and at other times pretending that said taxes were uncollectible because the lands were not worth the amounts imposed thereon—which your orator also avers is without foundation in fact—the only reason (if any) why the land on which said taxes are levied are not worth the amount of said taxes—which is denied—is because said city of New Orleans has refused to drain them, either by completing the system or by keeping the canals already dug open and clean.

25. And your orator further shows that by said act of purchase and transfer of June 7, 1876, and the stipulations therein contained, said city of New Orleans, in addition to the former duties on her imposed of trustee for the collection and payment of said drainage taxes for drainage warrants, became the voluntary and contractural trustee for the collection of the taxes then due, and was bound to use her utmost efforts for the collection of the same under the terms of said act of sale, and to disregard all the illegal and unconstitutional acts of the legislature aforesaid, and having failed and neglected so to do, and having done everything in her power to destroy said taxes and defeat their collection, and this notwithstanding various suits brought against her for her dereliction of duty in this regard, and especially in the face of the following cases, to wit: John Crossly & Sons, Limited, *vs.* The City of New Orleans, No. 9384, U. S. circuit court, eastern district of Louisiana, filed April 18, 1881, and excepted to May 11, 1881; State of Louisiana, *ex rel.* John Crossly & Sons, Limited, *vs.* City of New Orleans, filed December 28, 1881, in the civil district court, parish of Orleans, and subsequently removed to this hon. court and filed therein on the 22 day of April, 1882, being now No. 9935 on the docket thereof; John Crossly & Sons, Limited, *vs.* The City of New Orleans, No. 10337 on the docket of this hon. court, filed August 24, 1883, and pleaded to Nov. 17, 1883, and James W. Peake *vs.* The City of New Orleans, No. 11614 on the docket of said court, filed August 10, 1887, (the pleadings in which are referred to for greater certainty, and which your orator prays may be taken as a part hereof), she has become accountable to your orator and other holders of drainage warrants, for all moneys collected and not paid for drainage warrants, for all moneys misapplied, and also for such sums as might have been collected had said city done her duty in the premises, and which have become lost and wasted, because of said non-fulfilment of her duty as contractural and voluntary trustee, between the time she took charge in June, 1871, to the time a receiver was appointed by this hon. court in June, 1891, in suit No. 12008, on the docket thereof, and more especially between the date of the sale aforesaid from said Van Norden and said canal company on June 7th, 1876, to said June 13th, 1891.

26. And your orator is advised and shows to the court that defendant The City of New Orleans—will set up and plead as a discharge to this suit that she has discharged herself from all liability to account for drainage taxes which she has collected or ought to have collected for the benefit of the holders of said warrants, by the issue and delivery, between May 10th, 1872, and December 31st, 1874, of $1,672,105.21, of her bonds of the drainage series, issued and delivered pursuant to section 17 of act No. 73, of the year, 1872, or some other act, to take up drainage warrants issued for work done pursuant to act No. 30 of the year 1871, but your orator avers that the city of New Orleans had not at any time prior to the date of said act No. 16, approved February 24th, 1876, or prior to the execution of said contract of purchase dated June 7th, 1876, made pursuant to that act, asserted or claimed that she had ever been so discharged, but had at all times acted upon the theory that said bonds were issued in discharge of a fixed liability cast upon her by said section 17, of said act No. 73 of 1872, and your orator is advised and so charges that said act No. 16 of 1876, was an authority for the city of New Orleans to purchase said drainage boats, tools, implements and franchise, and was a legislative recognition that the drainage fund as created by law, and as it stood on the records of the city of New Orleans, and as recorded in the mortgage office had not been discharged in any manner or to any extent by the issuance and delivery of said bonds, and was an appropriation of so much of said fund as would be necessary to pay the said purchase warrants without offset or impairment by reason of the issue and delivery of said bonds of said drainage series.

27. And your orator avers that the said contract of purchase was entered into in view of and in consideration of the provisions of said act No. 16 of the year 1876, and its effect upon the rights and remedies of the said Van Norden, that neither at the time of entering into said contract, nor when said warrants were delivered in discharge of the price of the sale, did defendant disclose to said Van Norden that she would claim that the issuance and delivery of said bonds had discharged her of liability to account for and apply drainage taxes and funds—including those due by herself, to the payment of the warrants so issued to him, but on the contrary, defendant in and by said contract of sale, and the covenants therein contained, recognized and asserted the existence of said drainage taxes as applicable to the payment of said warrants, and agreed "not to obstruct or impede, but on the contrary, to facilitate by all lawful means, the collection of drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed between the said parties hereto that the collection of drainage assessments shall not be diverted from the liquidation of said warrants and payment of expenses as hereinbefore provided for, under any pretext whatever, until the full and final payment of the same," and said Van Norden, who was ignorant that said city claimed or would claim a discharge from liability on account of the issuance and delivery of said bonds of said drainage series, would

not have entered into said contract if he had been advised that any such claim would be made as a defense herein, and so your orator is advised and avers that the defendant is now estopped in equity and good conscience from pleading or maintaining said defence; and your orator avers that he has made amicable demand upon defendant for the payment of his warrants, but without avail.

To the end therefore that said defendant may under oath, according to its best and utmost knowledge, information and belief, full, true and direct and perfect answer make to this bill and the interrogatories hereinafter numbered and set forth at the foot of this bill, and that an account may be taken of all drainage taxes, assessments, and judgments imposed and rendered under acts No. 165 of March 18, 1858, No. 191, of March 17, 1859, No. 57 of March 1, 1861, and act No. 30 of 1871, and the various acts of the legislature of Louisiana supplementary thereto and amendatory thereof, and of all moneys collected by said city of New Orleans under the aforesaid acts, and of any and all other assets and property that came to said city of New Orleans under the aforesaid acts of the legislature or any of them, as well as of each, any and all payments, disbursements and dispositions thereof, and that a further account be taken of all losses, waste of, and damage caused by said city of New Orleans to said drainage-tax assessments and judgments by reason of the illegal and wrongful acts of administration, and violation of the duties and obligations inposed on her by said act of sale of June 7th, 1876, or any of them, or from any other cause, and that the sum found to be due on said accounting with interest, may be decreed to be paid to your orator and other parties similarly situated, to the full extent of their warrants with interest thereon, and that the amount of taxes assessed as aforesaid against the city of New Orleans on her streets, squares, and public places, be specially decreed to be a trust fund in the hands of said city, applicable to the payment of said warrants of your orator and such other holders, who may avail themselves of the benefit of these proceedings and offer to pay their share of costs, expenses, and counsel fees herein, and that said city of New Orleans be decreed estopped from setting up any defence of offset thereto or payment thereof by reason of the issuance of said bonds of said drainage series issued and delivered pursuant to said act No. 73 of the year 1872, and that your orator and said other parties similarly situated may have judgment against said city of New Orleans, for the amount of the drainage warrants respectively held by them, with interest and costs, and that he may have such other and further relief and redress as to right and justice may appertain and as the court is competent to give in the premises.

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this hon. court directed to said city of New Orleans, on a day certain therein to be named, and under a certain penalty, to appear before this hon. court, then and there to answer all and singular the premises, and to stand to, perform and abide such order, direction and decree as may be meet

and agreeable to equity and good conscience, and your orator as in duty bound will ever pray.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainants.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
v.
CITY OF NEW ORLEANS. } No. 12350.

For amendment to the bill of complaint in the above-entitled cause, after the last word of the 14th clause insert the following:

Your orator further avers that the said warrants owned by him were presented to the then administrator of finance of the city of New Orleans for payment pursuant to law, on the 6th day of June, 1876, but there being no funds at the time to the credit of said Mississippi & Mexican Gulf Ship Canal Company available for the payment thereof said administrator indorsed upon each of said warrants the fact that they had been so presented; by reason whereof interest became due on said warrants from date of presentation until paid at the rate of eight per cent. per annum.

After the last word of the prayer of the bill insert the words, viz:

And your orator specially prays that the defendant in accounting for the taxes for which she is liable in the drainage fund, may be charged with interest thereon at the rate of six per cent. per annum from the date when the several assessments were homologated, and that your orator and other warrant-holders similarly situated may be allowed and decreed interest on the warrants held by them at the rate of eight per cent. per annum from June 6, 1876, until paid.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Sept. 4, '97, and on the 7th day of the same month and year I served a copy hereof on Branch K. Miller by handing the same to him in person in the city of New Orleans, La.

(Signed) J. V. GUILLOTTE,
U. S. Marshal.
By JOHN EARLY,
Deputy U. S. Marshal.

Answer.

Filed Oct. 30, 1897.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350. In Equity.

The answer of the above-named defendant to the bill of complaint of the above-named plaintiff.

This defendant, saving and reserving to itself, now and at all times hereafter, any and all manner of benefit and advantage of exception, which can or may be had or taken to the complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in any way material or necessary for it to make answer unto, *it* answers and says:

That by the several acts, No. 165 of 1858, "to provide for leveeing, draining and reclaiming swamp lands in portions of the parishes of Orleans and Jefferson," No. 191 of 1859, supplementary to the first act, No. 57 of 1861, "to provide for collection of drainage assessments," etc., and No. 30 of 1871, "to provide for drainage," etc., the last-named act introducing the Mississippi & Mexican Gulf Ship Canal Company that undertook said drainage, the legislature devised a drainage system for the lands specified, all of which is more fully hereinafter set forth, and to said acts special reference is made for fuller explanation and greater certainty.

This defendant avers that the said several acts propounded a system of drainage for the city of New Orleans, the expense of which was to be borne by the owners of the lands drained, to be collected from them by assessments, and, as in all systems of special taxation for local improvements, the assessments were based upon the prospective benefits proposed by the drainage.

That by the earlier of these acts the appointment of commissioners was provided for, for whom the board of administrators of the city of New Orleans were afterwards substituted, by whom plans were to be prepared, exhibiting the lands to be drained, the names of the owners, and the probable cost of drainage; the plans were to be filed in designated courts, after due notice to the property-owners; the commissioners, and subsequently the administrators, were authorized to levy assessments on such lands for the drainage expenses; the assessment-rolls, like the plans, were to be filed in said courts, and while these assessments, levied in advance, for prospective drainage and benefit to the land, imported no liability if the drainage failed and was of no benefit to the lands, the acts provided that the homologation of the plans, though creating only such provisional liability, should subject the lands to a lien and privilege to secure the cost of drainage, and that the judgments homologating the assessment-rolls, though creating only such conditional liability, should be judgments

against the lands and the owners thereof, on which execution might issue.

This defendant, further answering, shows that the greater portion of these assessments were made at an early period after the acts of 1858, 1859 and 1861, and many years thereafter a corporation, known as the Mississippi & Mexican Gulf Ship Canal Company, professing to have the means to secure the drainage promised years before, succeeded in procuring the passage by the General Assembly of the State of Louisiana of said act No. 30 of 1871, by which it was authorized to build protection levees around the drainage districts, digging parallel and intersecting canals, properly connected, of the requisite depth, width and capacity, by which it was claimed that the water gathered within the levees could be conducted to a reservoir canal along the shores of Lake Pontchartrain, thence pumped into the lake by pumps and machinery to be furnished and operated by and at the expense of the city of New Orleans, or its board of administrators, and the said act, assuming the practicability of the scheme, not verified by the result, authorized an extension of the drainage districts; that the said act further substituted the board of administrators of the city of New Orleans for the commissioners constituted by the said prior acts, directed the transfer of the drainage tableaux, and office and other records to the said board of administrators, authorized them to levy and collect the assessments, and subrogated them to all the rights of the commissioners; that for the work of the company warrants were to be issued, as was provided by said act, payable, however, only from drainage taxes, and to bear 8% per annum until the taxes should be collected; and this defendant further shows, that the said plans and assessments, without warrant or authority of law, embraced public streets, parks, squares, and other public places or "public things," not subject to taxation or to assessments for local improvements, or to any form of taxation, and as to the assessments of private property, or property owned by private persons, made or to be made, based entirely on the anticipated or prospective consideration, they were resisted by the said owners of private property, on defenses, which were sustained by the courts, of the complete failure of the prospective and anticipated consideration, the commissioners and the company, and its assignee who succeeded it, having failed to accomplish the promised drainage, as will be more fully shown hereafter.

And this respondent, further answering, denies that the aforesaid assessments on public streets, parks, squares and other "public things," included in what is termed by the bill of complaint herein "balance due on assessments," are or were ever due and owing by this respondent, and also denies that the said act of 1871, or any other act, confirmed or made exigible such void assessments; and as to the said assessments against private property, or property owned by private persons, they were incapable of enforcement, by reason of the defenses applicable and pertinent to the same by the owners of said property, particularly by reason of the defense of the property-owners that the drainage scheme accomplished or effected no drainage, and conferred no benefit of any character whatsoever

upon the property, and save that the act of 1871 directed the collection of such assessments, this defendant denies that they, or what is termed by the bill of complaint the "balance" to be due on the assessments, were due, confirmed or made exigible, or could be made such, by said act, or any other act, owing to the failure of the entire system of drainage, on the successful accomplishment of which the assessments and their collection depended as a condition.

And further answering, this respondent shows and admits, that the said commissioners and the said board of administrators illegally including in said plans prepared and filed by them, said public streets, parks, squares and other public places, and illegally including in said assessment-rolls assessments on said "public things," and illegally extending the said assessments to what the bill terms the fourth drainage district, the law and certain ordinances purporting to create said district being unconstitutional, and null and void, and was so decided by the supreme court of the State of Louisiana in the succession of Patrick Irvin, 33d La. An. Rep., p. 63, prepared and filed the rolls, and made the assessments stated in the bill.

And further answering, this respondent avers, that no judgment of homologation or approval by any court, particularly such as are averred in the bill herein, could exceed, transcend or have any greater effect, than the authority contained in the said several acts, so as to permit or give validity to any assessments or taxes other than those made upon or against private property, or property owned by private persons, nor could they in any manner or to any extent give validity to any assessments made or taxes levied against public streets, parks, public squares, or other "public things," or to create even the color of a charge of liability against the city of New Orleans.

And further answering, this defendant says, that the said judgment- homologating such plans and rolls, do and can give no validity to such assessments on public streets, parks, squares and other "public things," nor do they bind or create any liability against the said owners of private property, if the proposed drainage was not successfully accomplished; and this defendant denies, that such judgments of homologation against the lands or owners, or any of the property therein mentioned save of the conditional character stated, now are, or ever were, judgments of any force or effect against such lands, property or owners, owing to the complete failure of the anticipated and prospective consideration, on which the assessments and homologations were based; and this defendant shows, that said judgments of homologation, of not the least validity in respect to the aforesaid assessments on public streets, parks, squares, or other "public things," were and are of no force, for the further reason that the drainage was never at any time accomplished.

Further answering, this defendant admits, that the assessments levied by the commissioners first, and later by the administrators, consisting of said illegal assessments of "public things," and of assessments against private property not capable of enforcement, as already set forth, were of the amounts stated in the bill, and this defendant again denies the aforesaid assessments, whether or not in-

cluded in the homologated rolls, incapable as they were of enforcement against private property, for the causes hereinbefore set forth, and utterly void so far as they bore or purported to bear on or against public streets, parks, squares or other "public things," were ever due or owing, or that there is or was at any time what the bill terms any "balance," or any part thereof, outstanding or in any manner due, or that of the said alleged "balance," there was a single dollar due by respondent on the said public streets, parks, squares, public places or other "public things," exempt from any assessments under the said statutes providing for the same.

And further answering, this defendant shows, that for at least five years after the enactment of the said statute of 1871, the said Mississippi & Mexican Gulf Ship Canal Company for part of the time, and Warner Van Norden, its assignee, for the other part thereof, claimed to have been engaged in the work of drainage they undertook; that the result of their enterprise demonstrated their plans to be fatally defective, and insufficient in every particular; and further answering, this defendant avers, that the canals claimed to have been dug by the said company and its assignee were not sufficient in number, width, depth or capacity, and from defective digging and excavation, improper connection, and other insufficiencies and defects, no water would flow into them, or reach the aforesaid reservoir canal, from which it was the company's plan the water was to be pumped into the lake, and that the levee work claimed to have been done by said company and its assignee was wholly insufficient to afford any protection from overflow, the protection levee in front, with which the said company and its assignee had nothing to do, providing the only protection from overflow, so that there was, respondent avers, on the part of the said company and its assignee, a complete failure of their undertaking to drain the lands, and neither was entitled to any consideration or should have received any warrants for the same, and whether or not the said plans had the indorsement and approval of engineers this defendant has no knowledge, but whether so indorsed and approved or not, failure was the result, and the said company and its assignee, charged with the execution of the said work, are solely responsible for its failure, this defendant having furnished pumps, labor, machinery and borne the expenses of operating the same, and having done everything required of it by the said act of 1871, and respondent denies that the plan or plans of the company was or were in any manner supplemented by this defendant, and defendant denies the allegation in the bill to the effect that the "plan was well devised, complete and sufficient," in any respect and that if carried out and completed, would have protected the lands from overflow, improved the drainage, and fitted the lands for agricultural, business, residence or any other purposes, but all such allegations in the bill and others to like effect are untrue.

And further answering, this defendant avers, that whether the said company and its assignee dug and deepened canals, as is alleged, and to the extent as is stated in the bill, or handled the yards of earth, or did levee work, as set up in the bill, this defendant has no knowledge, but charges that all the work, whatever it may have

been, claimed to have been done by said company or its assignee, was utterly defective, insufficient, and inadequate to secure any drainage of the lands as hereinbefore set forth, and respondent denies to be true the allegations in the bill to the effect that the work from 1871 or at any other time was prosecuted by the said company, or its assignee, or either, with "great vigor," or any vigor at all, and it denies that said work conformed in all or any respects to the requirements of the said statutes and the design of the said board of administrators, and that it was approved or accepted by them, and that the work was adequate or at all adapted to secure the proposed drainage; and this defendant further denies that it required only the completion of a gap at Lake Pontchartrain, and the placing in position of a pump, to complete the system; but each and all of said allegation-, and others to like effect, are untrue, and this defendant avers the fact to be that all of the work of the said company was badly executed, defective, and wholly unsuited for any drainage, and failed to accomplish any, as hereinbefore set forth, and this defendant again affirms.

And further answering, this defendant says, that in 1876, or by the beginning of that year, the work of drainage and levees which had theretofore been attempted by the said company and its said assignee having completely failed, the General Assembly of the State of Louisiana, by act No. 16 of that year, was constrained to dispense with the services of the company and its assignee, and to authorize the purchase by this defendant of the dredge-boats, rights, franchises, and other property of the company, for a price in drainage warrants, delivered to Warner Van Norden, the said assignee, payable only from drainage taxes, and this act was followed by the said purchase from and surrender of the franchises by the said company and its assignee, as shown by the said legislative act and act of purchase, a copy of which is filed with the bill, to which reference is made.

And further answering, respondent shows, that there was no obligation imposed on respondent by the said act of 1871, or that of 1876, or in any manner by law, to the warrant-holders, or to the payment of warrants, or in any respect to said drainage warrants, save a proper diligence to collect the taxes out of which the same were payable, and apply the collections to their payment, and that this charge imposed by the said legislative act respondent fully performed, and hence there is no basis whatever to hold this respondent liable for assessments against private property or the owners of private property, or for the aforesaid illegal and void assessments on public streets, parks, squares, or other public places or "public things," or for the payment of the drainage warrants issued under the act of 1871 or 1876, or for any other act or conduct of this defendant, under said act of 1871, or that of 1876, or for any cause whatsoever.

And further answering, respondent states, that whether or not complainant is the holder, by assignment or otherwise, of the drainage warrants described in the bill, and issued to Van Norden, or is the transferree or assignee of any other of the pretended claims

alleged in the bill, or whether or not he was or is a citizen of the State of New York, this defendant has no knowledge, information or belief, but this defendant denies that the said Van Norden has or ever had any claim whatever against it, on or in respect to said warrants, or any of them, or arising from or out of the said act of 1876, or by reason of the non-completion of the drainage, or the non-collection of the drainage taxes, or in respect to any causes or things whatsoever.

And further answering, this defendant, save and except that the said act of the General Assembly of the State of Louisiana of 1876 directed that the drainage taxes collected be applied to pay the purchase warrants, as well as other warrants, denies that said act was any destination, new or otherwise, of drainage assessments, funds or taxes, as they then stood, to the payment of the purchase price of the dredge-boats and other property, or to the purchase warrants issued to Van Norden, or to any other warrants, or that the said act had the least purpose to give, or that it gave, the least validity to the aforesaid void assessments or taxes on public streets, parks, squares, public places or other "public things," and this defendant denies that a dollar of drainage taxes collected from private property has ever been diverted from drainage-warrant holders.

And further answering, respondent shows, that said act of 1876 neither intended, nor did it impose, any obligation whatsoever on this defendant to the holders of the drainage warrants issued to Van Norden, for the purchase of the said property and franchise, or in respect to drainage taxes and their collection, or to warrant-holders of any character whatsoever, save to account for collections as already stated.

And further answering, this defendant denies, that by the said act of 1876, or any of the stipulations therein contained, this defendant became the voluntary or contractual trustee for the collection of the taxes which the bill claims "to be then due," but which as a matter of fact and law were not due or owing in any sense.

And this respondent further denies, that previous to the said act of 1876, there was imposed on it the duties of trustee, for the collection and payment of drainage taxes for drainage warrants, or any duty whatever, in respect to said taxes, save to account for collections or assessments on private property, but this defendant alleges, that subsequent to said act of 1876, it applied and devoted itself with great diligence, and to the full extent of its ability, to the effort to improve and make serviceable the canals, levees, and other drainage work of the said company and its assigns, and to drain the lands; and this defendant, to aid in the collection of drainage taxes, established a bureau of traffic in the city hall, and the holders of the drainage warrants appointed an agent, who was placed in charge of the same, with the consent and authority of this respondent, to proceed with the collection of the drainage taxes, and who gave such instruction as he deemed judicious as to the collection of such taxes, which were always followed by the officials of this respondent, and besides, respondent did all in its power to prosecute the collection of the same; the services of the attorneys and executive officers of

this respondent in this behalf were directed at all times to such collections, and were also entirely at the service of and freely used by the said agent, whenever required, and that they were diligent in their efforts to make such collection; the drainage taxes were extended on the regular tax bills of this respondent, asserted and claimed on every account filed in the courts by administrators, executors, syndics, and persons exercising like authority; that a large proportion of the property assessed for taxes was remote from the inhabited limits of the city, in the swamp, and unavailable for the collection of said taxes, especially under execution, with the said drainage assessments for unaccomplished drainage recorded in the mortgage office; but notwithstanding a great number of executions were issued, whenever, in the judgment of the said agent or the officials of this respondent, they were deemed expedient; and by said modes and others collections were made, and all accounted for, and the wholly untenable proposition, of the bill, is in effect, that respondent is to be held as guarantor of the residue of assessments and taxes uncollected, which the combined efforts of the aforesaid agent and attorneys and other officials of the city of New Orleans, and the sheriffs of the parish of Orleans, were unable to collect, to a great extent not susceptible of being realized even if the work of drainage had been performed, and which the district courts, as well as the supreme court of the State of Louisiana held could not be enforced; that in May, 1882, the latter court, in the suit of Davidson *vs.* The City of New Orleans, 34th La. An., p. 170, the plaintiff therein being assessed for and contesting a large amount of drainage taxes, held that the same could not be collected or their payment enforced, because of the failure of the consideration of the assessments, namely, drainage not performed, and to that decision reported in 34th La. An., p. 170, special reference is made, and it is prayed to be taken as part of this answer; and this respondent utterly denies the allegations of the bill that said decision was because of or in any manner due to any failure or neglect of duty on the part of this respondent, in respect to drainage or drainage acts, or that there was any such failure or neglect or that the supreme court imputes to or intimates any such failure or neglect; but this respondent avers, that said decision was solely because of the complete failure of said company and Van Norden, assignee, to effect any drainage; and this respondent, again averring its utmost efforts, continued and persisted at all times, to make effective the drainage undertaken by the said company and its assignee, and to collect the assessments, shows, that the drainage, and the collections of the assessments therefor, failed, not from any act of omission or commission or conduct whatever of this defendant, but solely and only on account of the complete failure of the company and its assignee to accomplish the work of drainage and levees, which they undertook, and the other causes aforesaid, and the decisions of the courts hereinbefore mentioned, that there was no basis to demand their payment.

And further answering, this defendant shows, that all the allegations in the bill which charge respondent with any neglect of duty with regard to said work of drainage and its non-completion, and

impute negligence or carelessness of any kind in respect to the collection of the said drainage taxes, and particularly the allegations that undertake to charge respondent with the responsibility for the non-collection of drainage taxes, are wholly untrue and unfounded, and hence this defendant denies all and every allegation in the bill to the effect that by the act of 1876 the duty was cast upon it "to complete the drainage system or some other," and that after said purchase, "respondent had the power, machinery and outfit to complete the system, or adopt some other that would have drained the lands or made them available for the payment of purchase warrants or any other," and that respondent had "an unlimited and unexhausted power of taxation," or any power of taxation, "by which defendant could have obtained the money to have completed the drainage," and that "defendant abandoned all pretense of draining," or destroyed or impaired in any manner what is styled by the bill the "source" from which all the warrants were to be paid, but each and all of said allegations, and all others to like effect, are entirely unfounded, and the facts are that respondent, after the adoption of the said act of 1876, did all in its power, and all that could be reasonably expected of it, to drain the lands; that it had no power, nor was it under any obligation, to adopt any system of drainage or power of taxation for drainage purposes, the whole expense of which, under the law, was to be assessed exclusively on private property, that is, property owned by private persons, within the territory to be drained, and all taxation by this defendant being limited at all times by the constitution and laws of the State of Louisiana, and confined to municipal purposes other than and excluding all expense of drainage, and as to the assessments, at the time of the sale of the property and franchises, by Van Norden, while of the amount stated in the bill, they consisted, as herein already set forth, of the aforesaid illegal assessments on public streets, parks, squares, public places and other "public things," and of the aforesaid assessments against private property, or assessments against private persons, incapable of enforcement.

And this defendant denies the allegations to the effect that the drainage from its commencement, or at any time, had been prosecuted with vigor by complainant or its assignee, and "that respondent ceased work on the same," and "sold some of the boats and machinery," save some old, unsound, dilapidated and useless boats and material, admitted to have been sold, and that respondent "allowed others to rot and sink," and that "they were in first-class condition when received," and that "respondent allowed the canals to fill up and become clogged," the fact being, and this respondent so avers, that the canals were clogged and filled up from the defects in the digging and of the construction by said company and its assignee; and defendant further denies, that they were in any sense destroyed or in the least manner impaired by it, but on the contrary, this defendant avers, that it sought and proceeded in every way to improve the said work of drainage, defective and insufficient from its inception, attempted by the company and its assignee, and this defendant specially denies that it

destroyed or neglected "the plan of the company," and that it "incapacitated itself for drainage work," but all such allegations in the said bill, and others to like effect, denying defendant's diligence and other efforts to make serviceable the work of the company and its assignee, are wholly untrue; and further answering, defendant denies, that in the suit of The Park Commissioners *vs.* City of New Orleans, this defendant set up and claimed that it was entitled to an offset of drainage taxes against the demand urged in said suit, but that said taxes had been accounted for, and applied in the payment and redemption of drainage warrants, and were not "lost to the fund," as the bill charges; and this defendant denies that it ever claimed or appropriated a dollar of drainage taxes, and as to the allegation that when proceedings were brought against it to erase and cancel drainage taxes, that this defendant, with knowledge of the work and its value, never called witnesses to prove it, and that in the case of Girardey *vs.* The Heirs of Henry, that respondent, "with knowledge that the land was drained and of the benefit thereo," never called witnesses, etc., and "suffered the matter to go by default," this defendant shows that the matters in said allegations are untruly stated, and the facts are that there was no drainage or benefit to the lands involved in said proceedings and suit, and that the drainage taxes were by the court decreed to be cancelled, and the inscriptions erased, on the proof produced by the owners that there had been no drainage accomplished, and hence the taxes could not be collected, but not from any omission or negligence of this defendant; and defendant, further answering, shows, that if in some case, not particularized in the bill, steps were not taken to dissolve injunctions to restrain the execution of drainage judgments, it was, as this defendant believes and charges, because in view of the then pending litigation, contesting the said drainage taxes, in the opinion of the law officers and executive officials of this respondent of that period, executions and motions to dissolve only brought fresh litigation, barren of practical, beneficial or desirable result, in any particular; and this defendant, further answering, denies the allegations of the bill to the effect that since the aforesaid purchase, it has "done nothing to compel the collection and payment of the drainage taxes, and nothing towards the collection of said taxes, but to keep an office in the city hall, where the agent of Warner Van Norden sought to induce payment of drainage taxes," etc., and that "but one execution had been issued on drainage judgments since June, 1876," and "that this defendant by other means had destroyed," or in the least "impaired the drainage fund," but defendant avers, on the contrary, that it used the utmost diligence to collect said taxes, and respondent denies to be true in any respect or particular, that it has become or is accountable for any drainage taxes collected, every dollar whereof ever collected having been fully accounted for and applied in accordance with law, or that any of said taxes have been misapplied, or that a dollar of said taxes has not been collected that could have been collected, or that a dollar has been wasted or lost, or misapplied, by the non-fulfillment of any duty by respondent, between June, 1871, and June, 1891, or between the date of the sale

by said company to Van Norden, June, 1871, or at any other time or periods, but respondent avers that its whole duty in the premises has been fully performed, particularly as hereinbefore alleged and again affirmed.

And further answering, respondent shows that in the year 1877, no drainage having been accomplished by the said company or its assignee, under assessments for the greater part made at least twenty years before, and in all that time clouding property against which they were assessed, and preventing its sale or improvement, the General Assembly enacted the statutes of that year, mentioned and referred to in the bill, by which certain lands were excluded from the drainage districts defined in earlier acts, and directing that no drainage taxes should be collected on any of the lands until there had been conferred and received by the same such improvement, by canals, levees and draining, as would effect drainage equal in value to the said assessments, and directing the erasure of drainage inscriptions, but respondent shows that for years after the adoption of the said statutes it used the utmost efforts to drain the said lands and collect the said assessments, and respondent admits that in May, 1881, in response to complaints of the property-owners against assessments for drainage never accomplished by said company or its assignee, the common council of defendant thought proper to instruct the mayor to issue his proclamation, advising the property-owners of their rights, as declared by the supreme court of the State of Louisiana shortly afterwards; and this defendant shows and admits that this decision of the highest court of the State of Louisiana was followed by the public notice and proclamation directed by the council, substantially to the effect of that decision, that the collection of drainage taxes could not be enforced; but respondent denies the allegation to the effect that after "this period of supineness and inactivity," referring to the collection of drainage taxes, the proclamation was directed, there having been, as this respondent avers, no such supineness or inactivity, at any time, on its part; and respondent equally denies the allegation and in the sense intended by the bill, "that said proclamation advised the non-payment of taxes," but avers that the proclamation announced the understanding by the council of the legal rights of the property-owners, as declared by the courts; and respondent also denies that the said council directed the other publication referred to in the bill, "in the prosecution of any purpose to destroy the drainage taxes and dissuade their payment, and to point out how the payment of drainage taxes might be avoided," save that the proclamation announced the relief to which the property-owners were entitled under the decision, and this defendant admits that large amounts of drainage taxes have been cancelled and erased under this decision, and that it has become the jurisprudence of the State, but this defendant denies that said taxes have been lost "in consequence of the suggestion or proclamation" put forth by defendant, but that said erasures and cancellations have been solely because, under the decisions of the courts, the collection of the drainage taxes could not be enforced.

Whether the acts of the General Assembly of the State of Louisiana

of 1877 and 1882 on the subject are unconstitutional or illegal, or violative of article 1, section 10, of the Constitution of the United States, or are simply declaratory of legal rights as a legal proposition, this defendant submits to the court, and as to the allegation in the bill importing that this defendant used the act of 1877 as a pretence to cease or omit in any degree the efforts to drain said lands, and to collect the said drainage taxes, and "at other times pretended the lands were not worth the taxes," the same are untrue, but the facts are, that after, as before, the said acts, defendant's efforts to effect the said drainage and collect the taxes were persistent and continued, and though in fact a large portion of the lands seized for taxes were unsalable, as already stated, the fact was never suggested by defendant in any manner in connection with the collection of the said drainage taxes or work of drainage, and had not the least influence to diminish, nor did it diminish in any degree the efforts of this defendant to drain the said lands and collect the said taxes.

And further answering, this defendant shows that never liable for the so-called purchase warrants, payable only from drainage assessments, based on the prospective consideration of drainage, and the corresponding benefit, never fulfilled, and having used its best efforts to make effective the said drainage plan, and attempted execution thereof by the company and its assignee, not susceptible of being made serviceable for drainage, owing solely to the defective plan and entirely imperfect and insufficient work of the said company and its said assignee, and this defendant having used its utmost effort to collect said drainage assessment on private property, and not liable for the said assessments on public streets, parks, squares, public places and other "public things," not only because the drainage was never performed, but because the said assessments were utterly illegal and void, as hereinbefore set forth, this defendant shows that there is not the slightest basis to hold it liable to complainant, or other holders of drainage warrants issued to Warner Van Norden, for the purchase of the said franchise, dredge-boats and other property, or for any cause whatsoever, nor is there the least basis to hold that under the aforesaid act of 1876, or any other act, or for any cause whatever, the said purchase warrants have any claim to payment from or on account of said void assessment on public streets, parks, squares, public places and other "public things," nor is there any foundation whatever for the pretenses of the bill asserting the liability of this defendant for the warrants of 1871, or any other drainage warrants, payable only from drainage taxes that could be collected on assessments against private property, and on or in respect to which there is not and never was any liability whatever of this defendant, as hereinbefore alleged and again affirmed.

Further answering, this respondent shows that under the act No. 73 of 1872, this respondent issued $1,672,105.21 of the bonds of this city, since paid or funded into its bonded debt, to take up drainage warrants issued under act No. 30 of 1871, all of which bonds were used, and applied at various dates, between the 10th of May, 1872,

and 31st of December, 1874, by exchanges for and redemption of said drainage warrants, to the full amount of $1,501,494.39 of said drainage warrants, the bonds having been issued in said exchanges at the rate of 90c. on the dollar, as directed by said act of 1872; and a statement of said bonds issued, and of warrants exchanged, with the ordinance of the council relating thereto, is herewith filed and made part hereof, and to which, as well as said acts, special reference is made, for fuller explanation and greater certainty, and now this respondent charges and avers that if said assessments on streets, squares and public places ever produced any liability on the part of respondent, again denied, then said bond issue and application thereof in the redemption of $1,501,494.39 of drainage warrants, far in excess of said assessments, must be deemed in law and equity to operate a full discharge of said liability, as adjudged by the Supreme Court of the United States, in the suit of Peake *vs.* The City of New Orleans, to which fuller reference is hereinafter made, and accordingly said discharge, if liability ever existed, this respondent in addition to all other defenses, now avers and sets up as a defense against and in bar of the complainant's bill, and of all the demands therein, and of all the relief thereby sought, and the full benefit of said discharge is insisted upon in this answer; and this respondent further shows that at and prior to the adoption of the act of 1876, and the purchase from Van Norden under it, the issue and application of the bonds aforesaid in the redemption of the drainage warrants, and the discharge thereby effected of all liability of respondent, if any ever existed, for the aforesaid illegal assessments of streets, squares and public places, was fully known to all drainage-warrant holders, and especially to Van Norden himself; that he or his assignees or pledgees were the holders of a very large amount of the drainage warrants redeemed by said bonds, and respondent believes and charges that the act of 1872 was passed mainly at the instance and for the benefit of said Van Norden, and neither he nor any holder of drainage warrants can pretend or urge that the city of New Orleans is now to be called on to pay void assessments, when if the liability ever existed, again denied, it was more than satisfied by the aforesaid bond issue sought by Van Norden, and of which he and the other warrant-holders had the full benefit.

And further answering, respondent charges that fully apprised of said bond issue and said discharge the result thereof, neither the said Van Norden or any drainage warrant-holder can now urge that this respondent did not assert said discharge, known in its full scope and effect at all times to said Van Norden, and never controverted by him or any warrant-holder, until the utterly unfounded pretension was advanced in the previous suit of complainant, met promptly by the defense of said discharge, sustained by the decision of the Supreme Court of the United States; and respondent utterly denies that it ever acted upon or intimated that the said bonds were issued for any liability cast on respondent by the act of 1872, for there was no such liability; and respondent equally denies the allegation that the said legislative act of 1876 was in any line or word any recognition of the so-called "drainage fund" as it then stood on the records

of the city or of the mortgage office, and "had not been discharged in any manner," etc., but respondent avers that the whole purpose and effect of said act was to require the application of collections of drainage assessments on private property to the payment of drainage warrants, and the act left the said discharge in full force and virtue; and as to the allegations in the bill to the effect that the discharge was not claimed, this respondent, reiterating the allegations in this answer on that point, avers and charges, that Van Norden, well knowing of said discharge, also knew that if he or any other warrant-holder ever undertook to set up the pretensions of this bill in respect to said void assessments, that respondent, with no reason to anticipate such unfounded demand, would repel it, and insist and maintain that said bond issue had completely discharged the asserted liability, or pretended obligation to apply the said assessments on streets, squares and public places, described in the bill as due by respondent, but never due, to the payment of said warrants issued to Van Norden, or to any other warrants; and respondent again denies, that said act of purchase, or any covenant therein, recognized in any manner the existence of any drainage taxes as applicable to the payment of any warrants, but the purpose and effect of said act was as this respondent has set forth, and not otherwise, and the stipulation in said act "not to impede, but to facilitate, the collection of drainage taxes," etc., to which the bill makes reference, refers to drainage assessments on private property, with which respondent has fully complied.

And further answering, respondent utterly denies the allegations that "Van Norden, who was ignorant respondent would claim said discharge, could have entered into said purchase if advised that such claim would be made," etc., and on the contrary, respondent avers that both he and the company, utterly insolvent, unable to continue the attempted drainage, the property professedly sold by him to respondent having been subjected to sale under execution for the company's debts, and the sale to him adjudged fraudulent, as appears by the decision of the supreme court of the State in the suit of Marchand *vs.* Van Norden, 23rd An., p. 803, that under such circumstances Van Norden was eager to sell to respondent for a price far in excess of the value of the property, and take his chance of payment from assessments on private property, and this respondent avers that the pretension now advanced of respondent's asserted liability for said void assessments is an afterthought, without merit or foundation of any kind.

Respondent further charges that all of the dredge-boats and other property sold to it by Van Norden were of little or no value, or in any event, of a value infinitesimal as compared with the price paid for the same, and that the sale thereof for the price stipulated as to such property was a fraud upon this defendant and its tax-payers.

And further answering, respondent shows that all the drainage taxes ever collected have been faithfully applied as the law directs, and the allegations in the bill that the taxes collected at the office in the city hall, or at any other place or time have not been accounted for, are denied; that if this defendant ever was a debtor for drain-

age taxes, which is denied, the aforesaid issue of bonds for the redemption of drainage warrants far exceeded any liability, if any there was, of this defendant, for collections, and at all times since said issue, on an adjustment of accounts, the said bond issue shows, and the fact is, that any and all liability for the taxes collected, if any ever existed, which is again denied, has been more than discharged by said bond issue more than sufficient besides to cover the aforesaid assessments on public streets, parks, squares, public places and other "public things," if said assessment ever produced any liability, which is again denied.

This defendant further shows, that in the suit of —— —— *vs.* —— ——, No. — of the docket of this court, this defendant was ordered and rendered an account of all drainage taxes, and defendant submits that there is no reason to renew the call or order for such account.

And respondent further charges that by the amendment to the constitution of the State of Louisiana, proposed by the General Assembly thereof in 1874, and which was subsequently adopted and went into effect from the first of January, 1875, the city of New Orleans was thereafter prohibited from increasing her debt in any manner, or from issuing any evidence of debt, or warrant for the payment of money, except against cash in the treasury, the said amendments providing that it should not prevent the issue of drainage warrants to the said Van Norden, transferree of the said company, under act 30 of 1871, but payable only from drainage taxes, to which amendment, found on page 56 of the Acts of the General Assembly of the State of Louisiana of 1874, special reference is made, and prayed to be taken as part hereof; and respondent shows, that drainage warrants, by the law of their creation, payable only from drainage taxes, never after that amendment could become part of respondent's debt, nor could any omission of duty on the part of respondent, in respect to drainage or the collection of taxes, if any, which is again denied, or any act or conduct of respondent, or any act of the General Assembly, or purchase of property under such act, bind or obligate respondent, after such amendment, for the payment of any such drainage warrants, or for the purchase price of said property, or for any drainage warrants issued for such price, or for any debt or liability whatever in respect to drainage, nor did the said act of 1876, or contract of purchase, attempt to impose on this respondent any such prohibited liability, but in accordance with the said constitutional amendment, the price of the property directed by said act to be purchased could be paid only from assessments on private property, and, accordingly, the act and contract of purchase expressly stipulated that such price was payable from drainage taxes alone; and further answering, this defendant shows, that if, as respondent maintains, the aforesaid bond issue and application thereof must be deemed to operate as a complete discharge of all liability of this respondent, for the aforesaid assessments on public streets, parks, squares, public places and other "public things," if prior to said bond issue any such liability could be deemed to exist, which is again denied, then, in view of said amount, far in excess of the

said assessments, furnished by this defendant, and applied by the drainage-warrant holders to pay their warrants, neither the act of 1876, nor the contract of purchase under it, could bind this defendant to pay one dollar of said assessments, or for the payment of any warrants, purchase or otherwise, from and out of said assessments and thus create a debt in violation of said constitutional amendment, by reviving the asserted liability, which, if it ever existed, had been more than satisfied at and prior to the adoption of the said act of 1876; and respondent further shows that in the suit heretofore brought by said drainage-warrant holders, it had been adjudged by the United States circuit court that by reason of said constitutional amendment, as well as other defences, that save an accounting for taxes collected, said warrant-holders had no claim whatever against this respondent, and to said suits and decrees therein special reference is made, namely:

And further answering, this respondent shows that heretofore it was sought to be made liable to the holders of the drainage warrants, under the aforesaid legislative acts of 1871 and 1876, and that all the grounds then available to the warrant-holders, are, in respect to the defense of *res adjudicata*, by law deemed to be, and as a matter of fact are, included in that previous suit, and were the same as those on which respondent is sought to be held in this case, and the grounds of defense in that suit are in substance and effect the same as those urged in this present suit; that the relief sought in this suit is the same as that claimed in the previous suit, and the bill in that, as in this suit, was filed for and in behalf of all warrant-holders; that the question in this suit was certified when the case stood on the demurrer to the bill, to the Supreme Court of the United States, and the answer of the Supreme Court, it is submitted, should not affect or prejudice respondent in its defense in this answer and on the testimony to be adduced, or to impair the defense of *res adjudicata* nor urged, and respondent shows, under the full testimony adduced, and the argument in the Supreme Court of the United States in the previous case, there was rendered a final decree on the merits, affirming that of the circuit court, and adjudged against the complainant in that suit, and in favor of respondent, the court holding and deciding that the holders of drainage warrants had no right or claim against respondent in respect to the matters and things there alleged, and dismissed said bill, with no right to file another; all of which appears in the suit of said J. W. Peake *vs.* The City of New Orleans, No. 11614 of the docket of this court, and the final decree of the Supreme Cour therein, found in 139 U. S. Reports, p. 342, to which special reference is made, and is prayed to be taken as part of this answer; and this defendant, entitled to include in this anwer the defense based on said decision, now sets up and avers said *res adjudicata*, in bar of and against complainant's bill, and all demands therein, and of all relief thereby sought, and the full benefit of said defense of *res adjudicata* of which defendant could avail by the plea of said defense in bar of the bill is prayed for, claimed and insisted upon in this answer.

And further answering, this defendant shows, that the demands of the drainage-warrant holders, set up in the bill, have had full

consideration in the courts, and have been fully pronounced without merit, and that the bill is an attempt to renew litigation upon some pretense of newly discovered grounds, substantially covered by past litigation and decrees, and in equity and law this litgation should be considered ended by the aforesaid peremptory exception or *res judicata*, as well as because of the prescription of five years, and respondent shows, that by the law of Louisiana, all suits and actions on promissory notes payable to order or bearer, and on all effects transferable of negotiable by indorsement or delivery and all promissory notes negotiable or otherwise, are prescribed by five years from maturity, and the prescription runs against all, as appears by the articles 3540 and 3541 of the Civil Code, to which special reference is made for fuller explanation and greater certainty; and respondent shows, that the drainage warrants, and this suit thereon, are within the scope of the said law of prescription, and said prescription of five years, in addition to all the other defenses herein urged and again affirmed and insisted upon, this defendant now avers and sets up as a defense, in bar of and against complainant's bill, and of all demands therein, and of all relief thereby sought, and the full benefit of said defense of prescription, could avail by the plea of said defense in bar of the bill, is prayed for, claimed and insisted upon by this answer.

And further answering, this respondent says, that any suit against it based upon any and all matters and things set out in the bill, cannot be maintained against it, for the reason that the same, and the liability sought to be established by the bill, is under the law of Louisiana barred by the prescription of ten years, established by articles 3544 and 3547 of the Revised Civil Code, to which special reference is made, for greater certainty, the same as though set out at length herein, and in addition to all of the other defenses herein urged, and again affirmed and insisted upon, this defendant now avers and sets up as a defense, in bar of and against complainant's bill, and any and all demands therein, of grounds upon which the same may be made, and of all relief sought, the said prescription of ten years; and this defendant claims all the benefit and defence of prescription could avail by the plea of the same in bar of the bill, the same said benefit being now prayed for, claimed and insisted by this answer.

And this defendant denies all and singular — and all manner of unlawful combination and confederacy, wherewith it is by the said bill charged, without this, that there is no other matter, charged, or thing in the said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, traversed, avoided, and denied, is true to the knowledge and belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove, *if* this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges, in this behalf most wrongfully sustained.

(Signed) BRANCH K. MILLER,
SAM'L L. GILMORE,
City Att'y, Solicitors.

STATE OF LOUISIANA, }
Parish of Orleans. }

Personally appeared Walter C. Flower, who being duly sworn, deposes and says, that he is the mayor of The City of New Orleans, the defendant named above; that as much of the foregoing answer as concerns the acts or doings or omissions of the said defendant, is true to the best of his knowledge, and so much thereof as concerns the acts or doings of other persons he believes to be true.

(Signed) W. C. FLOWER, *Mayor.*

Sworn to and subscribed before me this 29th day of October, 1897.

[SEAL.] (Signed) P. ALPH. RABOUIN, *Not. Pub.*

"*Transfer* 1."

Mexican Gulf Ship Canal Co. and W. Van Norden, transferee, to the city of New Orleans.

Filed with and made part of bill Nov. 26, 1894.

N. O., 7th June, 1876. Sale of franchises. No. —. Mis. & Mex. Gulf Ship Canal Co. and W. Van Norden, transferee and individually, to the city of New Orleans.

UNITED STATES OF AMERICA, }
State of Louisiana, Parish of Orleans, City of New Orleans. }

Be it known, that on this seventh day of the month of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundredth, before me, Gustave Le Gardeur, Jr., a notary public, duly commissioned and sworn, in and for the city and parish aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared:

1. The Honorable Charles J. Leeds, mayor of the city of New Orleans, and herein duly authorized as such, under, and by virtue of ordinances Nos. 3479 and 3539, administration series, adopted by the council of the city of New Orleans, respectively, on the 25th day of April and 23d day of May, 1876, and herein furthermore fully authorized under and by virtue of the provisions of act No. 16 of acts of 1876, approved February 24, 1876.

2. Messrs. John Mathers, Jr., and Samuel D. Moody, both of this city, and herein acting, the former as president, and the latter as secretary, of the Mississippi & Mexican Gulf Ship Canal Company, a duly authorized corporate body of this State, domiciled in this city, and herein acting in their said capacities, under and by virtue of a resolution of the board of directors of the said Mississippi & Mexican Gulf — Canal Company, adopted at their sitting of the 3d day of June, 1876, a duly certified copy of which said resolution is hereto annexed for reference.

3. And Warner Van Norden, Esquire, also of this city, herein acting in his own name, individually, and also as transferee and

pledgee of the said Mississippi & Mexican Gulf Ship Canal Company, under and by virtue of an act passed before Andrew Hero, Jr., a notary public, in this city, on the 22d day of May, 1872.

And the said Mississippi and Mexican Gulf Ship Canal Co. through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee of the said company, by virtue of the aforerecited act of the 22d of May, 1872, before the said A. Hero, Jr., notary, declared that for the consideration and on the terms and conditions herein set forth, they do, by these presents, grant, bargain, sell, convey, transfer, assign and set over, with a full guarantee against all trouble, debts, mortgages, claims, evictions, donations, alienations or other encumbrances whatsoever, unto the said city of New Orleans, the said Charles J. Leeds, as mayor aforesaid, accepting and purchasing for, and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, duly certified copies whereof are hereunto annexed for reference, and also under and by virtue of the rights and powers conferred by said act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof.

All and singular, the rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of every nature and kind whatsoever which the said Mississippi and Mexican Gulf Ship Canal Company, has, or may have, under and by virtue of act No. 30 of the legislature of this State, entitled "An act to provide for the drainage of New Orleans," passed at the session of 1871, and of all other acts of the legislature of this State, and which the said W. Van Norden, as transferee and pledgee aforesaid, has, or may have, under and by virtue of the aforesaid act, passed on the 22d day of May, 1872, before the said Andrew Hero, Jr., notary.

And the said W. Van Norden, in his own name, individually declared that for the consideration and on the terms and conditions hereinafter set forth, he does by these presents grant, bargain, sell, convey, transfer, assign and set over, with a full guarantee against all trouble, debts, mortgages, claims, evictions, donations, alienations or other encumbrances whatsoever, unto the said city of New Orleans, the said Charles J. Leeds, as mayor aforesaid, accepting and purchasing for and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, and also under and by virtue of the rights and powers conferred by said act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof.

All and singular the following-described dredge-boats and derricks, together with the machinery, engine, tackle, apparel and appurtenances, and all other necessaries thereto belonging, together with the hereinafter-mentioned articles and effects, to wit:

Dredge-boat No. 1, 70 feet long and 30 feet wide.
Dredge-boat No. 2, 70 feet long and 30 feet wide.
Dredge-boat No. 3, 70 feet long and 30 feet wide.
Dredge-boat No. 4, 70 feet long and 30 feet wide.

Dredge-boat, styled the J. O. Noyes, 62 feet long and 19 feet wide.

Dredge-boat, styled Clam Shall dredge, 65 feet long and 30 feet wide.

Dredge-boat known as Ridge boat, 83 feet long and 30 feet wide.

Four derricks, accompanying respectively dredge-boats Nos. 1, 2, 3 and 4.

One steamtug, known as the Olive.

One barge of far-floating derricks.

One floating boarding-house.

One lot of buildings at Halfway house.

One lot of large and small castings, including one heavy cast-iron mainmast, two heavy cast-iron topmasts, hoisting and surging drums, duplicate cog wheels and various small castings, etc., the whole more fully set forth in a detailed inventory on file in the office of the city surveyor.

The said Warner Van Norden, in his own name, individually, is the owner of the above-described dredge-boats, derricks and other effects and articles for having acquired the same by purchase from the said Mississippi and Mexican Gulf Ship Canal Company by act passed before the said A. Hero, notary, on the 22d day of November, 1872.

To have and to hold the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of the said Mississippi and Mexican Gulf Ship Canal Company and of the said W. Van Norden, as transferee and pledgee aforesaid, and the said dredge-boats, derricks and other articles and effects above described, unto the said city of New Orleans forever, by virtue of these presents.

And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee aforesaid, and — his own name individually, declare that they, moreover, and by these presents, subrogate the said city of New Orleans, in and to all and singular the rights, actions and remedies to which they are or may be entitled under and by virtue of the aforesaid act No. 30 of 1871, or of all other acts of the legislature of this State, and under and by virtue of the afore-recited acts passed before the said Andrew Hero, Jr., notary, respectively, and on the 22d day of May and 22d day of November, 1872, hereby authorize the said city of New Orleans to exercise and enjoy the said rights, actions and remedies in the same manner and to the same extent as it, the said Mississippi and Mexican Gulf Ship Canal Company, and he, the said W. Van Norden, as transferee and pledgee and in his own name, individually, might or could have done.

The sale of the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages by the said Mississippi and Mexican Gulf Ship Canal Company, and the said W. Van Norden, as transferee and pledgee aforesaid, and the sale of the said dredge-boats, derricks and other articles and effects by the said W. Van Norden, in his own name, individually, are made and accepted

for and in consideration of the price and sum of three hundred thousand ($300,000) dollars, payable in drainage warrants.

And now the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, declared that they have covenanted and agreed, and do, by these presents, covenant and agree, that the said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden, in consideration of the sales herein made, and also in full settlement of all existing claims for damages which the said Mississippi and Mexican Gulf Ship Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, ever had, or have now, or may have against the said city of New Orleans. And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, does, moreover, by these presents, fully authorize the said city of New Orleans to pay the said sum of three hundred thousand dollars, in drainage warrants, to the said Warner Van Norden.

And now, to these presents, personally came and appeared the Honorable John G. Brown, administrator of accounts of the city of New Orleans, who, by virtue of the authority in him vested by said ordinance No. 3539, administration series, and of the rights and powers conferred by said act No. 16, of acts of 1876, and with the consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for and in the name of the said company, has presently in the presence of the notary and witnesses undersigned, handed over and delivered the said sum of three hundred thousand dollars ($300,000) in drainage warrants to the said Warner Van Norden, who as transferee and pledgee aforesaid, and in his own name, individually, and with the full and entire consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for and in the name of the said company hereby acknowledging receipt of the same.

And for the purpose of providing for the payment of the warrants issued under and by virtue of these presents, and of all other drainage warrants heretofore issued and outstanding, the said city of New Orleans, through its mayor aforesaid, the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Warner Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, do, by these presents, covenant and agree that the existing rights and powers of the holders of drainage warrants, under the civil acts of the legislature of this State relative to drainage and drainage assessments, shall remain unimpaired, and that the drainage tax and assessment shall be administered, collected and paid in the manner and under the terms and conditions following, to wit:

The bureau of drainage collections shall be organized in an office at the city, as follows, to wit:

A book-keeper, who shall be appointed by the city council, and who shall keep such books and records, make such reports, and perform such duties as may be required by the administrators of finance and accounts. His salary shall not exceed two hundred dollars per month. Said officer shall not in any manner obstruct or delay the business of the office. He shall be removable by the council, upon the complaint of the collector, hereinafter provided for, for cause.

If desired by the said W. Van Norden, a duplicate set of books shall be made and placed subject to the use of the said collector.

Until the drainage warrants issue- by virtue of these presents, in conformity with said ordinance No. 3529, administration series, and all other drainage warrants, heretofore issued and now outstanding, shall be liquidated and paid, the collection of drainage assessments, shall be assigned to an officer, who shall be selected by the said W. Van Norden, and be confirmed by the city council. Said officer shall give bond with a good and solvent security in the sum of twenty-five thousand ($25,000) dollars for the prompt and faithful execution of the duties and powers provided by law for the collection of drainage assessments and the prompt and efficient collection of the same in accordance with law; and the business of his office shall be subject to the supervision of the administrators of finance and accounts. He shall receive a compensation in lieu of expenses of all kinds, including books, bills, stationery, legal services, costs of court or clerk's hire of three hundred ($300) dollars per month and 2½ per cent. commission on collection of drainage assessments, and shall make such monthly reports as may be required by the administrators of finance and accounts. Said collector shall be continued in office until the liquidation of the said drainage warrants issued by virtue of these presents or heretofore issued and now outstanding; and in case of death or resignation a successor shall be chosen as above provided for.

No receipt of the said collector for drainage assessment shall be valid unless contersigned by the administrator of finance.

The city council shall have the right to remove the said collector for good and sufficient cause, and a successor shall be appointed as hereinabove provided.

All expenses, fees and charges incurred in the collection of drainage assessment shall be paid out of the drainage fund.

All suits and judicial process and writs relating to — appertaining to drainage assessments and taxes shall be and continue as heretofore controlled by the city council, and be conducted by the city attorney, but all writs of "*fieri facias*" to be issued as required by law and the judgments of the courts.

All parties owing drainage assessments shall have the right to pay the same in drainage warrants, at their face value and interest thereon, and the said collector and administrators of finance shall receive the same in satisfaction of all drainage assessments.

All parties owing drainage assessments in the fourth drainage district shall be entitled, upon the prompt payment of the four-tenths of the whole assessments, to an extension of time for the payment

of the remaining six instalments; the said six instalments shall be paid yearly as prescribed by an ordinance already adopted by the city council.

And now the said Chas. J. Leeds, hereby promises for and binds and obligates the city of New Orleans, after the date of these presents, to issue no drainage warrants other than those issued by virtue of these presents, in conformity with said ordinance No. 3539, administration series, and such other drainage warrants as may now be issued and outstanding until said warrants have been fully liquidated and paid, and not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by and between the said parties hereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever until the full and final payment of the same; and it is moreover well understood and agreed by and between the said parties hereto, that all work heretofore done by said Wm. Van Norden, not certified shall be measured by the city surveyor, and the same shall be paid for in drainage warrants in the usual form, and that inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issued to the said W. Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same.

And now by virtue of the foregoing, the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Warner Van Norden as transferee and pledgee aforesaid, and in his own name, individually, declared that they do, by these presents, remise, release and forever discharge the said city of New Orleans from and against any and all claims and demands of every nature and kind whatsoever which they ever had or have now or may have against the said city of New Orleans.

And now it is moreover well understood, covenanted and agreed that the said Mississippi and Mexican Gulf Ship Canal Company and the said Warner Van Norden, individually, and as transferee and pledgee aforesaid, shall and will, at all times, protect the said city of New Orleans, against and save it harmless from any and all claims and demands of every nature and kind whatsoever which may have been, can now be or may hereafter be set up against the said city of New Orleans, or against them or either of them in reference to drainage work, arising out of their connection with the drainage of the city, or in any manner pertaining or relating to their acts, rights, franchises and privileges under said act No. 30 of 1871, or in reference to the said dredge-boats, derricks and other articles and effects, provided, however, that the guarantee herein set forth shall not be considered as extending any further than to warrant the city of New Orleans in the title to the boats and property herein transferred to it by said W. Van Norden, and to save

and indemnify the said city of New Orleans from any loss, injury or damage arising from the acts and conduct of the said Mississippi and Mexican Gulf Ship Canal Company or the said Warner Van Norden in reference to, or arising from their connection with the drainage work herein referred to.

Thus done and passed in New Orleans, at my office, the day, month and year first above written, in the presence of Armand Pitot, Jr., and Gustave M. Letellier, competent witnesses, who have signed these presents with the said parties and me, notary, after reading the whole.

(Original signed)

CHAS. J. LEEDS, *Mayor.*
J. MATHERS, *President.*
S. D. MOODY, *Secretary.*
J. G. BROWN,
Adm'r Pub. Acc't.
W. VAN NORDEN.
A. PITOT, JR.
G. M. LETELLIER.
G. LE GARDEUR, *Not. Pub.*

Registered in Conveyance Book 108, folio 484.
New Orleans, June 7, 1876.
[SEAL.] (Signed) C. B. FISH, *Registrar.*

A true copy of the original on and of record in my office.
New Orleans, June 9, 1876.

G. LE GARDEUR, *Not. Pub.*

Ordinance No. 3479, *A. S., for Appraisement of Property.*

Filed with and made part of bill Nov. 26, 1894.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *April* 26, 1876.

(No. 3479, administration series.)

Be it ordained, That in accordance with the provisions of act No. 16, approved February 24, 1876, Thomas S. Hardee, city surveyor, be and he is hereby authorized and instructed to make a thorough examination of the condition and value of all the dredge-boats, machinery, tools and appurtenances belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavating of canals or building protection levees, making a report to the committee of the whole, together with a statement of all information in the possession of his office, concerning damages claimed by the said Mississippi and Mexican Gulf Ship Canal Company, or transferee thereof.

Adopted by the council of the city of New Orleans, April 25, 1876.

CHARLES J. LEEDS, *Mayor.*

Ordinance No. 3539, A. S.

Filed with and made part of bill November 26, 1894.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May* 26, 1876.

(No. 3539, administration series.)

Be it ordained, That the mayor be and he is hereby authorized and instructed to enter into notarial agreement with the Mississippi and Mexican Gulf Ship Canal Company, or transferee, for the purchase of all dredge-boats, derricks, parts of machinery and property of every description belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavation of drainage canals or construction of protection levees, as per inventory of the city surveyor, also for the full settlement of all claims for damages and to secure the absolute sale, relinquishment and transfer to the city of New Orleans of all rights, privileges and franchises created, authorized or arising in favor of the Mississippi and Mexican Gulf Ship Canal Company and transferee, under and by virtue of act No. 30 of 1871, or under and by virtue of all other acts of the legislature of the State of Louisiana, or ordinances of the city of New Orleans, and embodying the terms agreed upon between W. Van Norden and the committee of the whole.

Be it ordained, That upon the execution of the aforesaid notarial agreement, the administrator of accounts be, and he is hereby authorized and directed to warrant upon the administrator of finance for the sum of $300,000, in drainage warrants, in full settlement, as above provided.

Adopted by the council of the city of New Orleans, May 23, 1876.

Yeas—Bertoli, Brown, Bouny, Burke, Landry, McCarthy, Pilsbury.

CHARLES J. LEEDS, *Mayor.*

"*Inventory* 1."

Copy of the inventory of the effects of the Miss. & Mexican Gulf Ship Canal Co. transferred to the city of New Orleans, as on file in the office of the city surveyor. Filed with and made part of bill Nov. 26, 1894.

CITY SURVEYOR'S OFFICE,
ROOM 19, CITY HALL, *May* 1, 1876.

To the hon. mayor and administrators of the city of New Orleans:

In conformity with instructions conveyed in an ordinance recently adopted by the city council, I have made a careful and thorough examination of the property mentioned and represented by W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, and herewith have the honor to submit a report showing the condition and approximate value of the same, together with such other information as I have been directed to

furnish under the requirements of said ordinance. The property examined consists of:

7 dredge-boats.
11 derricks.
1 steamtug.
1 barge for floating derricks.
1 floating boarding-house.
1 lot of buildings at Halfway house.
1 assortment of large and small castings, etc., for dredge-boat machinery.

Dredge-boat No. 1.

Dredge-boat No. 1 is now lying in Upper Line protection levee canal, near Carrollton, and has not been provided with work for over five months.

It is 70 feet long and 30 feet wide. The capacity of dipper is 1¼ cubic yards at each lift, and the average capacity for excavating per month is 12,500 cubic yards. The hull is six years old, and shows a little leakiness near foot of iron mast, but is still in serviceable condition, and the engine, boiler and other machinery is in good working order. The boat has an upper deck, with serviceable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order.

The machinery of the derrick accompanying this boat is now stored upon the deck of the dredge, the frame having rotted and been abandoned.

The machinery, however, is in good order and would be ready for service as soon as a new frame could be constructed. The original cost of the dredge was $25,000, and the derrick $5,000.

Dredge-boat No. 3.

Dredge-boat is now actively at work in excavating the Lower Line protection levee canal at a point about one mile south and east of its intersection with the Mobile railroad. It is 70 ft. in length and 30 ft. in width. The capacity of dipper is 1¼ cubic yards to the lift and the average capacity for excavating is about 12,500 cubic yards per month. The hull is six years old, with but slight apparent leaks, and has been recently repaired, with a new floor on lower deck. It has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. This boat has been constantly at work and has suffered no delay except for a short period when difficulties were encountered in crossing the track of the Mobile railroad. The machinery is all in good, and serviceable working order, as well as that of the derrick accompanying it. The original cost of the dredge was $25,000, and the derrick $5,000.

Dredge-boat No. 2.

Dredge-boat No. 2 is now engaged in following boat No. 3 in deepening the Lower Line canal, and is now located near the crossing of the Mobile railroad. The length is 70 ft. and the width 30 ft. The capacity of dipper is 1¼ cubic yards to the lift and average capacity per month 12,500 cubic yards.

The hull is six years old, showing no leaks and in good working condition; it has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. The boat has been laid up for several months, a portion of the time undergoing repairs, and only recently resumed work in deepening the canal, behing boat No. 3. The entire machinery of the boat, together with that of the accompanying derricks, is in good order and capable of doing effective work. The original cost of the dredge was $25,000 and the derrick $5,000.

Dredge-boat No. 4.

Dredge-boat No. 4 is now lying alongside of boat No. 1, in Upper Line protection levee canal, near Carrollton, and has not been provided with work for more than five month-. It is 70 feet long and 30 feet wide. The capacity of dipper is 1¼ cubic yards and the average capacity for dredging about 12,500 cubic yards per month. The hull is six years old, presents no signs of leaking, and the whole is in serviceable order. It has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. The derrick accompanying this boat had a new frame built about eighteen months ago, and the machinery, together with that of the main boat, is in good order and ready for any work to which it may be assigned. The original cost of the dredge was $25,000 and the derrick $5,000.

Dredge-boat J. O. Noyes.

The dredge-boat J. O. Noyes is located at the same point in Upper Line canal with boats Nos. 1 and 4, and has been idle for four months.

It is 62 ft. long and 19 ft. wide. The capacity of dipper is one cubic yard, and average capacity of boat for dredging work about 6,000 cubic yards per month.

The hull is three years old, perfectly sound and free of leaks, and has an upper deck with suitable accommodations for all workmen. The machinery is in good order, and the boat is ready for active service. The original cost of the dredge was $25,000.

Dredge-boat Clam Shell.

The Clam Shell is now lying at the — Lower Line canal adjacent to the Gentilly Ridge road crossing, and has been idle for several months. It is 65 ft. long and 30 feet wide, the hull is 6

years old, and shows a few leaks, but nothing serious. The boat was constructed under a patent for a new dipper, and other royalty appliances, and is therefore the most costly of all the boats. The dipper resembles a clam shell from which the boat derives its name, and is capable of performing an immense amount of work, in cleaning and deepening old canals, or taking out the border cuttings of a new canal. The capacity of the boat is about 15,000 cubic yards per month, when provided with suitable work or soft digging. The machinery is in good order and condition and the boat ready for active service. It has also an upper deck provided with suitable accommodations for all mechanics and laborers and everything about it in fair condition. The original cost of the boat and outfit was $40,000.

Dredge Called Ridge Boat.

The Ridge boat is now lying in the London Avenue canal, or tail-race near the London Avenue draining machine, and has been idle for four months. It is 83 ft. in length and 30 feet in width. The capacity of dipper is one cubic yard and average capacity for excavating per month 6,000 cubic yards. The boat was purchased from the city by the canal company, and a new hull built about five years ago. It was furnished with a new boiler and water pumps, and the entire machinery and hull is now in good and serviceable working order. It has like all the others an upper deck, etc. The cost of the dredge including the new hull, etc., was $18,000.

Steamtug.

The steamtug is used as a transport for conveying pieces of machinery and supplies from the central depot at Halfway house to the different boats when required. It is several years old, and when new cost about $2,000. It is in serviceable order.

Barge for Floating Derricks.

The barge for floating derricks is now lying with the boats tied up in the Upper Line canal, and is 60 feet long and 31 feet wide. The hull is in good order, and no leakage visible. The original cost was about $1,000.

Floating Boarding-house.

The floating boarding-house is 28 feet in length and 14 feet wide. It contains a stove, cook-room, store-room, with sleeping berths and dining hall and has a good shingle roof. The hull is in good condition, with no apparent leaks. It cost to build about $500.

Buildings at Halfway House.

These buildings are located on the east bank of the new canal, opposite the Halfway house, and serve as a central depot for the distribution of machinery and supplies and for making repairs. They

consist of a frame house used as a store-room and office. One blacksmith shop with tools and appurtenances, a carpenters' shed and outbuildings and cisterns, etc.

The ground upon which they are built was leased from the "Fireman's Charitable Association," but the lease is about expiring and will have to be renewed or the buildings removed. The original cost of improvements was about $1,500.

Assortment of Castings, etc.

This assortment comprises various castings both large and small as duplicates to the different parts of the dredge-boat machinery and they are all stored at the central depot near the Halfway house. Some of the principal pieces are, viz:

1 heavy cast-iron mainmast.
2 " " topmasts.
Hoisting and swinging drums.
Duplicate cog-wheels various sizes. A quantity of small castings representing duplicates for almost every part of the machinery in use. The original cost of this assortment of iron-work was about $5,000.

Valuation.

In estimating the value of the property above enunciated and especially that of the dredge-boats, I have been confronted with grave difficulties in determining exactly how the valuation should be made.

A dredge-boat is something which really has no true market value at all times corresponding with its actual cost, therefore, it can only be deemed valuable in proportion to the amount of profitable work it may have the prospect of executing in a fixed period of time. In the hands of the present owner who has by law a specific and valuable contract to execute, or in the contemplated possession and use by the city, the dredge-boats would certainly possess a positive usefulness and consequently have some fixed or definite value. Governed by this view of the case the conclusion has been reached that it would be just and equitable to make a valuation on the basis of the actual or original cost of the property, but with a deduction of 25 per cent. as an offset for wear and tear from use and deterioration by age.

The following result has therefore been attained and is respectfully submitted:

Dredge-boat No. 1, original cost	$25,000
" " 2, " "	25,000
" " 3, " "	25,000
" " 4, " "	25,000
Dredge-boat "J. C. Noyes," original cost	17,000
" "Clam Shell," " "	40,000
Total	$157,000

Dredge-boat Ridge boat, original cost	18,000
Derrick of No. 1, original cost	5,000
" " " 2, " "	5,000
" " " 3, " "	5,000
" " " 4, " "	5,000
Steamtug, original cost	2,000
Floating boarding-house, original cost	500
Buildings at Halfway house, original cost	1,500
Floating barge for derrick, " "	1,000
Various castings, etc., for machinery, original cost	5,000
Making a total of	$205,000
Less 25 per cent	51,250
Leaving a balance for valuation of entire property	$153,750

Damages Claimed.

The damages claimed by the transferee are for delays at various times and places and are enumerated according to the statements as follows, viz:

Delay on lake-shore protection levee (1872) 80,000 cubic yards. Delay in crossing Jackson R. R. (1873) 24,000 cu. yds. Delay in crossing Mobile R. R. (1875) 68,000 cu. yds. dredge-boats idle not supplied with work (1875 and 1876) 190,000 cu. yds. making a total of 362,000 cu. yds.

It is claimed by the transferee that without the delays above enumerated the boats would have executed and he would have examined on estimate of 352,000 cubic yards in excess of what has been returned from this office, and that the estimate is made in cubic yards for the purpose of determining by an allowance of what the work would have cost, what the probable profits would have been, and consequently the damages sustained. From an examination made of the records in this office and from personal knowledge of the facts of the situation, I am of the opinion that the claim presented is excessive and is susceptible of very considerable deduction. A communication has been found in the letter book under date of Aug. 15th, 1872, from Wm. H. Bell, city surveyor, to J. C. Noyes, notifying him by directions of the administrators of improvements, not to commence excavations for lake levee until a certain price of planking and timber work adjacent was completed. It is claimed that this notification delayed the boats which were then ready to commence work and that the delay was equivalent to the performance of 80,000 cubic yards of embankment—but I can find nothing further in the records to show exactly how many days the boats were idle on consequence of this notification, and, therefore, I am not prepared to recognize any specific amount for this claim.

The delay in crossing Jackson railroad may be a just claim, but there are no records in this office showing any negligence or unnecessary action on the part of the city authorities, or of the railroad company in hindering the prosecution of the work, and I am not

prepared in this case either to admit or to dispute the claim until competent evidence is produced to establish it.

The claim for damages in crossing the Mobile R. R. cannot be justly established, as by a compromise effected between the city, the railroad company and the transferee, the question of damages was adjusted beforehand, and allowances made in drainage warrants to the transferee for that purpose.

The item of 190,000 cubic yards for delays in boats not being supplied with work during the latter months of 1875 and up to the present time of 1876, is subject to certain modifications from statements and explanations hereinafter to be made.

The boats that have been idle up to the 1st May inst. are, viz:

Boat No. 1	5½	months.
" " 4	5½	"
" J. C. Noyes	4	"
" Ridge boat	4	"
" Clam Shell	4	"

Of the above boats the only ones entitled to a consideration for damages are No. "1," "4" and the "Clam Shell." These boats finished the interior work they were engaged upon last November, and were ready to proceed with the excavations for the lake-shore revetment levee, but were prevented from so doing by the refusal of the city authorities to allow the city surveyor to furnish the necessary lines and levels.

The J. O. Noyes was withdrawn from the Nashville Avenue canal and tied up without the knowledge or consent of this department, and therefore is entitled to no consideration or damages for her idleness.

The Ridge boat also is entitled to no consideration, as work was provided for it, but not accepted. The only boats therefore for which an assessment for damages can be entertained are No. 1, No. 4 and the Clam Shell; and I have deemed that the most equitable way to arrive at a conclusion is to make an abstract from the records of what these several boats earned in a certain period immediately anterior to being stopped, and accept this as a fair estimate of what they would have earned and been entitled to in cubic yards for the whole period of their delay:

			C. yds.
Boat No. 1,	5½ months, at	12,720 yds. per month	...69,960
" No. 4,	5½ " "	12,350 " "	...67,925
" Clam Shell,	4, " "	2,890 " "	...11,560
Making a total of			149,445 cubic yards

As far as the actual damages are concerned in money, I am not able to arrive at a conclusion and do not feel myself called upon to express an opinion. But with the facts before you and the suggestions which have been made, there will no doubt be sufficient data

for the committee to be enabled to arrive at something like a just and satisfactory conclusion in the premises.

Respectfully submitted.

(Signed) THOMAS S. HARDEE,
City Surveyor.

Copy of Drainage Warrant.

Filed with and made part of bill Nov'r 26, 1894.

(Copy.)

No. 379. DEPARTMENT OF PUBLIC ACCOUNTS,
$2,000.00. NEW ORLEANS, *June* 6, 1876.

To the administrator of finance, city of New Orleans:

Ord. 3539, A. S.

Pay to the order of W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, two thousand dollars out of any funds in the city treasury to the credit of said company.

Drainage warrant.

This warrant is issued in accordance with the provision of act 30 of the session of the General Assembly of the State of Louisiana, held in the year 1871, and the administrator of finance, on presentation to him of this warrant, will pay the same in cash, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash this warrant then the administrator of finance is required to endorse upon the same the date of its presentation, and this warrant shall bear interest at the rate of eight per cent. per annum from and after the date of such presentation and endorsement until paid.

Charge Mississip-i and Mexican Gulf Ship Canal Company.

(Signed) J. G. BROWN,
Administrator of Accounts.

Presented for payment June 6th, 1876.

(Signed) E. PILSBURY,
Administrator of Finance.

Endorsed: W. Van Norden, transferee.

Office Supreme Court U. S. Filed Dec. 17, 1898. James H. McKenney, Clerk.

Petition for Writ of Certiorari.

In the Supreme Court of the United States, October Term, 1899.

THE CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER, Respondent. } No. 172.

Samuel L. Gilmore, city attorney.
Branch K. Miller, solicitors for petitioner.

Filed —— —, 1898.

—— ——, *Clerk.*

In the Supreme Court of the United States, October Term, 1898.

THE CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER, Respondent.

Petition for writ of certiorari requiring the United States circuit court of appeals for the fifth circuit to certify to the Supreme Court of the United States, for its review and determination, the case of John G. Warner, appellant, *vs.* The City of New Orleans, appellee, No. 691, November term, 1897.

To the honorable the Supreme Court of the United States:

The petition of the city of New Orleans respectfully shows:

1. That it is a municipal corporation, created by the acts of the General Assembly of the State of Louisiana, No. 20, of the session of 1882, and No. 45 of the session of 1896, and a citizen of said State.

2. That on November 26th, 1894, John G. Warner, a citizen of the State of New York, in the circuit court of the United States for the eastern district of Louisiana, brought his bill in his own behalf, as well as on behalf of all other parties holding obligations of the same nature and kind as himself, to charge petitioner as the debtor of certain taxes averred to have been levied by lawful authority, for the payment of certain warrants, the collection of which was made the duty of petitioner, by certain statutes, hereinafter more particularly described; that the liability of the city was averred as the result of a certain contract which it was alleged she had broken, and her asserted disregard and violation, of certain duties imposed upon her by statute, as to the prosecution of certain work of drainage, and the collection of taxes aforesaid.

3. That it was averred by the bill, that by act No. 165 of March 5th, 1858, the legislature of the State of Louisiana provided for the leveeing, draining and reclaiming of swamp lands in certain portions of the parishes of Orleans and Jefferson; which for such purpose were

divided into three draining districts, to which, by a subsequent act of said legislature, a fourth draining district was added; that the appointment of a board of commisioners was provided for each district, who were invested with all rights and powers necessary to drain the same; that said boards were authorized to cause plans of said districts to be made, designating the limits of the sections or districts to be drained, the subdivisions of property therein contained, and the names of the proprietors; also, the dimensions and directions of the canals to be dug, and the places where pumping engines were to be placed; that upon completion, these plans were to be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted, in French and English, in two newspapers, for a stated period, announcing that the commissioners would proceed to drain such section, defining the limits thereof, and indicating as nearly as possible when the draining thereof would — complete, and also the possible cost of the work; that after publication had been made for a designated period, the commissioners were directed to apply by petition to a court in the parish of Orleans, for that portion of the section or district lying within that parish, and to the district court for the parish of Jefferson, for that portion of the section or district lying within that parish; which courts were directed, upon due proof being made of the publications or notices, to decree that each portion of the property situated within said limits was subject to a first mortgage, lien or privilege, in favor of the commissioners, for such an amount as might be assessed against said section or district, and interest thereon at 6 per cent. per annum from demand; that the said decrees should be recorded, by the recorders of mortgages for the parishes of Orleans and Jefferson, which lien, privilege and first mortgage, it was declared, should take precedence over all other mortgages, liens or privileges, whatsoever, whether tacit, conventional, legal or judicial.

4. That the said commissioners were given authority to levy such uniform assessment or assessments, upon the superficial or square foot of lands situated within their respective draining districts or sections, to defray the expenses of the construction of levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of the act; that it was further provided, that on the non-payment of said assessments, judgments should be recoverable, before any court of competent jurisdiction, and the lands assessed should be sold, according to law.

5. That by act No. 191 of the General Assembly of the State of Louisiana, approved March 17th, 1859, provision was made for the issue of bonds designated as "draining bonds," in order to carry into effect the provisions of act No. 165 of 1858; that upon the issuance of the bonds, the board of commissioners should fix and determine the amount of the assessment, to be levied upon the superficial or square foot of the lands situated within the draining district of each board, in accordance with the act of 1858, and to fix and apportion the amount to be paid yearly by the owners of said lands, in order to pay the interest on said bonds as might mature, and the manner

of redeeming such bonds, was provided for in other sections of said act of 1859.

6. The bill further recites, that by the act of the legislature of the State of Louisiana No. 57 of 1861, entitled "An act to provide for the collection of the assessments for drainage, under the acts of March 18th, 1858, and the supplementary act thereto of March 17th, 1859," it was enacted, that the amount of assessments levied as aforesaid, should be collected and sued for in the manner following: That as soon as any assessment had been made, notice thereof should be given, a copy filed in the third district court of New Orleans, for assessments on property within that parish, and in the third judicial district court for the parish of Jefferson, for assessments made on property within that parish; that the said tableaux of assessments to be thus filed should set forth the amounts assessed, and the names of the owners of the lands, if known, and if the owners' names were unknown, the fact to be so stated; that a petition should be filed with the said assessment-rolls, praying, and an order rendered thereon, that all persons whom it might concern should show cause, within thirty days from the first publication, if any they had, why said assessment-rolls should not be approved and homologated, and that after due observance of this requirement, the said courts should, upon motion of counsel for the boards of commissioners, approve and homologate said assessment-rolls, which should be a judgment against the property assessed, and the owners thereof, on which execution might issue, as on judgments rendered in the ordinary mode of proceedings.

7. That by the act of the legislature of the State of Louisiana, No. 30, of its session of 1871, the Mississippi & Mexican Gulf Ship Canal Company, a corporation then existing, and domiciled in the city of New Orleans, was authorized and empowered to excavate drainage canals and build protection levees within the limits of New Orleans and Carrollton, on the terms and condition expressed in said act, and authorizing said company to excavate all canals, and to build all levees, to be designated and fixed by the board of commissioners of the city of New Orleans, the said act itself pointing out in certain parts, how and by what means the work of drainage should be executed by said company, and prescribing certain other details thereof; that by said act it was made the duty of the city surveyor of New Orleans, or an engineer appointed for that purpose, to examine the work done by said company during each month, and certify to the same; that it was made the duty of the administrator of accounts, on presentation to him of said certificate, to draw a warrant on the administrator of finance, in payment of the work so done, at the rate of fifty cents per cubic yard for excavations, and fifty cents per cubic yard for levees built; that these warrants it was the duty of the administrator of finances to pay on presentation to him, in case there were any funds in the treasury to the credit of said company; but that in the absence thereof, in whole or in part, the said administrator was required to endorse upon each warrant not so paid, the date of its presentation; from which date it should bear interest at the rate of eight per cent. per annum, until paid.

That in order to provide funds for the payment of such work, the boards of commissioners for each one of the several districts aforesaid were directed to transfer to the board of administrators of New Orleans, all moneys, assessments, and claims for damages, in their hands, or under their control, all titles to real estate, books, plans, tableaux and judgments in favor of the commissioners, the office furniture of the latter, a true statement of the claims of the commissioners against the city of New Orleans, to be adjudicated and settled out of money collected by the city, and pertaining to said drainage districts; and that the board of administrators should be and were thereby subrogated to all rights, powers, and facilities, possessed by the commissioners of the several districts, and the said board of administrators were directed to collect from the holders of property within the districts the balance due on the assessments, as shown by the books, which the bill avers were thereby confirmed and made exigible; to make an assessment of two mills per superficial foot in those parts of the three existing drainage districts, and on such other lands as should be brought within the protection levees contemplated by said act No. 30, of 1871, where no assessments had been made; and to execute and enforce the same, as provided by the several acts of the legislature creating and regulating said boards of commissioners; that all moneys so received from said commissioners, as well as by the collection of claims for drainage then due, and from the collection of assessments, and from any of the sources contemplated, should be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, to be held as a fund applicable to the drainage of New Orleans and Carrollton; and that all property, not money, so received, should be held in trust for the payment of said company.

8. It is further set up in the bill, that in accordance with the direction to that end contained in act No. 30, of 1871, the board of administrators of the city of New Orleans, by ordinance, created the fourth drainage district, embracing lands not contained in any of the three districts established by the act of 1858.

9. Proceeding, the bill sets forth, that the boards of commissioners were duly appointed, qualified, and entered upon the discharge of their duties, and did all of the acts, such as the making of plans, procuring the homologation of the same, the levying of the assessment, and having the same homologated by judgment, in accordance with the provisions of the several statutes hereinbefore mentioned.

10. The bill charges, that the board of administrators of the city, in compliance with act No. 30, of 1871, took possession of all the moneys, rights and privileges described in said act, and became possessed of all the means necessary to carry out the objects of the statutes aforesaid, and provide for the payment of all drainage warrants that might be issued under said act No. 30, of 1871; that the amount of the assessment handed over to the city of New Orleans, in the first and second districts, was $790,621.42; *those* in the third and fourth districts was $909,915.74; making a total of $1,699,637.16, of which there was assessed against the city herself, on streets and squares, as

follows: In the first district $223,110.60, in the second district $199,885.47, in the third district $207,441.46, in the fourth district $65,956.77; that on these assessments there had been collected from individuals, by the city of New Orleans, between the time she took charge, as aforesaid, and the 7th of June, 1876—the date of the sale from Van Norden and the canal company to the city, thereafter referred to in the bill—in cash, $78,748.51, and in drainage warrants, paid in pursuance of ordinance 2460, annexed to the bill as part of it, $151,174.16, leaving outstanding and due, on the books, a balance of $1,499,714.47, including the said sums which the bill claims were due by the city herself on streets and squares.

11. That on the 22d of May, 1872, the canal company, for a valuable consideration, assigned, transferred and set over, to Warner Van Norden, all its right, title and interest in and to the privileges and advantages granted it by the aforesaid act No. 30, of 1871; and by another act of sale, on November 22d, 1872, the company, for a valuable consideration, sold and delivered to said Van Norden all of its dredge-boats, derricks, flat-boats, and other property used in dredging.

12. The bill then avers that from the time the said board of administrators took charge, in June, 1871, pursuant to said act of 1871, a vast amount of drainage work had been done by the canal company and Van Norden, its transferee; that twelve miles of old canals were widened and deepened, and thirteen miles of new canals were dug, and that a corresponding amount of protection levees *were* built; the said work being in all respects conformable to the acts of the legislature, and the designs of the board of administrators, who duly approved and accepted the work; that to complete the entire system of drainage it was only necessary to complete a gap on the shore of Lake Pontchartrain, and the placing in position of the pumping engines on the lake shore, which was the duty of the city, under said act No. 30, of 1871.

13. It is then averred by the bill, that by act No. 16 of the legislature of Louisiana, approved March 24th, 1876, the city was authorized and empowered to contract with the canal company and Van Norden, as transferee thereof, for the purchase of the former's rights, franchises, tools, apparatus, implements, machines and boats, the purchase price to be paid in drainage warrants, payable out of drainage taxes, imposed under the several acts of the legislature hereinbefore set forth; and that after an appraisement, on the 7th of June, 1876, the said purchase was made, the city receiving from the said company and its transferee, the machinery, boats and other property of great value, for which it agreed to pay in drainage warrants three hundred thousand dollars, which were delivered to Van Norden, transferee, aforesaid; that complainant is the owner of three of said warrants, for the sum of two thousand dollars each; that the suit is brought thereon, as well as on the assignment, transfer and subrogation of Van Norden to complainant, of all his right, title and interest in and to said warrants, as well as of each and all rights of action which he had or has against the city of New Orleans, arising in his favor out of the said act of sale of June 7th, 1876, or the ac-

tion of the city of New Orleans thereunder, by reason of its failure to collect said drainage taxes, or by reason of the city to complete the drainage work, to the end that said taxes might be collected.

14. The bill then recites, that the said act No. 16, of 1876, providing for the payment of the purchase price of said dredge-boats, and other property, and by the issuance and delivery of drainage warrants, payable out of drainage taxes, was a new designation of said taxes by the legislature, which could not be diverted until said drainage warrants were fully paid, and placed said taxes beyond any claim that could be urged against them by the city of New Orleans, or by any other party or person whomsoever, especially as the city became the owner of said dredge-boats, franchises and implements, without paying her own money or property, or giving any personal obligation therefor.

15. That after said purchase the city alone was possessed with sole power, as well as the necessary tools and outfit, to complete the necessary system of drainage, and had the duty cast upon her to complete said system, or build and complete some other system of drainage; but that from the date of said purchase, in June, 1876, and notwithstanding said drainage work had, from the very commencement thereof, by the company, in 1871, and the prosecution thereof by Van Norden, as transferee, from May, 1872, been proceeded with with great vigor, and over two-thirds thereof had been completed, the city ceased all work on said system, and never thereafter commenced or completed any other, but sold some of the machinery so purchased, diverted the proceeds of taxes to other purposes than the payment of drainage warrants; and allowed others of said boats to sink or rot unused, and all notwithstanding that they were in first-class condition when received from the vendor; and thus rendered herself incapacitated for the completion of the drainage work aforesaid, or for any other work of drainage whatsoever; allowed the canals dug by said company and transferee to fill up, and to remain filled, with filth and sediment, thus becoming useless and worthless, and, in fact, destroyed a vast amount of work already done, to a very large extent.

16. The bill further sets out, that ever since its purchase the city had done nothing to compel or enforce the payment of drainage taxes, except to keep an office in the city hall, where the agent of Van Norden might induce drainage-tax payers, by persuasion, to pay their taxes, where some were paid, but the amount unknown to complainant, and that the same had never been accounted for; that the city, by proclamation of its mayor, advised the tax-payers not to pay the taxes, and by reason of her conduct in not completing the system, nor adopting any other to drain the land, the supreme court of Louisiana, in Davidson *vs.* New Orleans, in March, 1882 (34th La. An. Rep., pp. 170 to 178), decided that the said taxes could not be collected, which decision from the date thereof, became the settled jurisprudence of the State, whereby large amounts of drainage taxes were cancelled, and that the remaining had become of little or no value; that the city, by report of a special committee of its council, pointed out to drainage-tax payers, how, under the Davidson deci-

ion, they might avoid payment thereof, which suggestion put forth by the city, while trustee of the said fund, and the collector thereof, had ever since been largely adopted and enforced, and large amounts of drainage taxes erased and lost in consequence thereof; that in suits brought by tax-payers for this purpose the city made no defense; that the city, by other ways and means unknown to complainant, destroyed said fund, until, so far as the courts of Louisiana were concerned, the same became unenforceable, and so, utterly worthless to the holders of the warrants given for the purchase of the dredge-boats, etc.; this express violation of the express covenant contained in said act of sale and purchase, not to obstruct or impede, but, on the contrary, facilitate by all lawful means, the collection of said drainage-tax judgments, until all of said warrants should have been paid in full.

The bill proceeds, averring, that on some occasions the city had claimed the drainage taxes as her own property, and had been allowed the full benefit thereof in payment of her own debts, especially in a certain suit, where, being sued for an indebtedness of the commissioners of the city park, in a large sum of money, she claimed said sum sued for, should be credited upon the drainage taxes, amounting to $25,725.96, assessed against another portion of the tract of land, concerning which the city was sued; that this offset was allowed, for which, with 6 per cent. per annum, from the date of its allowance, she should account to the warrant-holders; the bill then proceeds to vindicate the excellence of the plan according to which the work was to be done, which it charges, if carried out, would have protected the lands from overflow from without, and would have removed all drainage from within.

17. The twenty-fourth paragraph sets forth, that at the time of the sale by Van Norden and the canal company to the city, the drainage assessments then uncollected amounted to $1,469,715.41; that the city, after her said purchase, not only had all the necessary authority, outfit and equipment, to have completed the said system of drainage, or to have adopted or completed some other sufficient system that would have drained the lands, and made them available for the payment of the warrants given for the purchase aforesaid, but that she had likewise an unexhausted and unrestrained power of taxation, under which, by a tax on all the property within the city of New Orleans, she could have supplied herself with sufficient means to have completed said system, or any other system; but that, in violation of her duty, and in repudiation of her obligation, she abandoned all pretense of draining, in any way whatever, and destroyed the very source from which she had bound and obligated herself to pay the warrants given for said purchase, sometimes pretending that the said taxes were illegal and unconstitutional, by reason of certain acts of the legislature of Louisiana, all of which, the bill avers, were void, as repugnant to the Constitution of the United States, especially section 10, article 1, and the 14th amendment thereof; and at other times pretending that said taxes were uncollectible, because the lands were not worth the amounts imposed thereon; which complainant avers, was without foundation

in fact, the only reason why the lands on which the taxes were levied were not worth the amount of the taxes being because the city had refused to drain them, either by completing the system, or keeping open and cleaning the canals already dug.

It is then charged, that by the said act of purchase of 1876 the city, in addition to the former duties imposed upon her, of trustee for the collection and payment of said taxes, became the voluntary and contractual trustee for the collection of taxes then due, and was bound to use her utmost authority for the collection of the same, under the terms of the said sale, and to disregard all the illegal and unconstitutional acts of the legislature aforesaid; thus having done everything in her power to destroy said taxes, and defeat their collection, notwithstanding various suits brought against her for her dereliction of duty in this regard, which suits are enumerated; that in consequence she had become accountable to complainant and other holders of drainage warrants, for all moneys collected and not paid to drainage-warrant holders, for all moneys misapplied, and also for such sums as might have been collected, had the city done her duty in the premises, and which have become lost and wasted because of the said non-fulfillment of duty as voluntary and contractual trustee, between the time she took charge, in June, 1871, to the time a receiver was appointed, in June, 1891, especially between the date of the sale by Van Norden and the company, June 7th, 1876, to June 13th, 1891.

18. The matter contained in the twenty-sixth paragraph of the bill, as to complainant's anticipation that the city would plead its issue of certain bonds, in discharge of the liability sought to be fixed upon it, may be disposed of by a mere reference, as the answer to a certified question from the court of appeals to this honorable court, to be hereafter more particularly dealt with, renders this part of the bill unimportant for the present purpose.

19. On February 4th, 1895, defendant filed its demurrer to the bill, general and special; the points made by the said demurrer were:

First. A denial of the jurisdiction of the circuit court, on the ground that plaintiff suing, as the assignee of Van Norden, himself the assignee of the canal company, which was a citizen of the State of Louisiana, was incompetent to maintain a suit in the circuit court against the defendant, likewise a citizen of Louisiana, the act of Congress prohibiting such suit by the assignee of a chose in action, where the assignor could not maintain such a suit.

Second. That all the matters and things alleged in the bill, had been finally adjudged by the circuit court in the case of Peake vs. New Orleans, as also, on appeal, by the supreme court, as would appear by its decision in volume 139 of the United States Reports, p. 342.

On February 26th, 1895, the demurrer of the defendant was sustained, and the bill dismissed, at the costs of complainant; whereupon the case was carried by appeal to the court of appeals for the fifth circuit.

20. On May 14th, 1895, the court of appeals, upon a statement

made by itself, requested the instruction of this honorable court upon two points, stated in the following questions:

First. Is the city of New Orleans, under the warranties, express or implied, contained in the contract of sale of June 7th, 1876, by which she acquired the property and franchises from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge of her own liability to that fund on account of assessments on streets, public squares, etc.?

Second. Should the decision in the case of James W. Peake *vs.* City of New Orleans, 139 U. S., p. 342, be held to apply to the facts in this case, and operate to defeat the complainant's action?

The first of these questions this honorable court answered in the affirmative; the second it declined to answer.

Warner *vs.* New Orleans, 167 U. S., pp. 473–478.

On May 31st, 1897, the mandate of the supreme court was filed in the court of appeals; whereupon, on June 10th, 1897, the court of appeals reversed the decree of the circuit court, and remanded the cause, with instructions to overrule the demurrer, and thereafter proceed as equity and good conscience may require.

The opinion found in 81st Fed. Rep., p. 650, is based upon two grounds:

First. That the city is estopped from pleading her bond issue as a discharge of her obligation to account for drainage taxes collected on private property, and as a discharge of her own liability to that fund, as assessee of the streets and squares; citing Warner *vs.* New Orleans, 167 U. S., 467; thus following the answer of the supreme court to the first question certified.

Second. That on the case made by the bill, the decision of the supreme court in Peake *vs.* New Orleans, 139 U. S., 242, does not necessarily apply to the facts of the present case, nor operate to defeat the complainant's action.

The opinion then stating, that "it follows that the circuit court erred in sustaining the demurrer to the complainant's bill."

21. After the filing of the mandate of the court of appeals, on July 1st, 1897, and the entry of a decree by the circuit court, in accordance therewith, defendant, on October 30th, 1897, filed its answer, setting up specially the following defenses:

First. That the acts 166 of 1858, 191 of 1859, 57 of 1861, and 30 of 1871, propounded a system of drainage for the city of New Orleans, the expense of which was to be borne by the owners of the lands drained, to be collected from them by assessments based upon the prospective benefits proposed by the drainage; that the assessment-rolls, like the plans preceding them, were to be filed in certain courts, and while these assessments, levied in advance for prospective drainage and benefit to the lands, imported no liability if the drainage failed, and was of no benefit to the lands, the acts providing for the homologation of the plans, though creating only such provisional

liability, should subject the lands to a lien and privilege to secure the cost of the drainage; and that the judgments homologating the assessment-rolls, though creating only such conditional liability, should be judgments against the lands and owners thereof, on which execution might issue; that said plans and assessments, without warrant or authority of law, embraced public streets, parks, squares, and other places, or "public things," not subject to taxation, or to assessment for local improvements, or to any form of taxation; that as to the assessments on property owned by private persons, based on prospective or anticipated draining, they were resisted by the owners, on defenses which were sustained by the courts.

Second. A special denial that the assessments on public streets, parks, squares, or other "public things," were, or were ever due or owing; together with a denial that the act of 1871, or any other act, confirmed or made exigible such void assessment; that the inclusion by the said boards of commissioners of the public streets, and places of like character, was illegal; that the act giving the board of administrators authority to create the fourth drainage district was unconstitutional, as was held by the supreme court of the State of Louisiana in the succession of Patrick Irwin, 33d La. An. Rep., p. 63.

That no judgment of homologation or approval by any court, particularly such as were averred in the bill, could exceed, transcend, or have any greater effect, than the authority contained in several acts, so as to permit or give any validity to asses-ments for taxes other than those made upon or against private property, or property owned by private persons, nor could they in any manner, or to any extent, give validity to any assessments made or taxes levied against public parks, public squares, or other "public things," or to create even the color of a charge of liability against the city of New Orleans.

Third. That the work done by the company and its transferee was defective and insufficient, and that by reason of the defective plan by which it was constructed, its failure was inevitable.

Fourth. That in 1876 the General Assembly of the State, by act No. 16 of that year, was constrained to dispense with the services of the company and its assignee, and to authorize the purchase by defendant of the dredge-boats, franchises, and other property of the company, for a price in drainage warrants, payable out of drainage taxes.

Fifth. That there was no obligation imposed on defendant by the act of 1871, or the act of 1876, or in any manner by law, to the warrant-holders, or to the payment of warrants, or in respect to the same, save a proper diligence to collect the taxes out — which the same were payable, and apply the collections to their payment, and that the duties thus imposed by the legislature, defendant had fully performed.

Sixth. A denial of any destination by the act of 1876 of the drainage taxes, otherwise than to direct that those collected be applied to pay the warrants, and it was denied that the act of 1876 gave any validity to the void assessments and taxes on public streets,

and property of a like character; also, that a single dollar of taxes collected from private property had ever been diverted from drainage-warrant holders, the single obligation of defendant being to account for taxes collected; a denial was further made that the city, under the act of 1876, was made the voluntary and contractual trustee for the collection of the same.

Seventh. A denial that prior to the act of 1876, there was imposed upon the city the duties of a trustee for the collection and payment of drainage taxes, or any duty whatsoever, save to account for the collection of assessments on private property; that defendant discharged its full duty under the act of 1876, as to the collection of taxes, the failure to collect many of which was due to the law applicable to the same, as laid down by the supreme court of Louisiana; that its efforts to collect were continued and persistent; that all that could be collected had been collected and accounted for.

Eighth. A denial of any neglect of duty with regard to the work of drainage, or its completion.

Ninth. A denial of any failure or neglect to defend suits, brought for the cancellation of drainage taxes.

Tenth. A denial that the acts of the legislature of Louisiana, Nos. 48 and 67, of 1877, and No. 20, of 1882, section 42, were void, as in violation of the Constitution of the United States.

Eleventh. That by its bond issue of $1,672,105.21, under act No. 73, of 1872, if respondent were liable for the assessment on streets, and places of a like character, the same was fully paid by said issue of bonds, which latter was fully known to all drainage-warrant holders, especially to Van Norden; that he, or his assignees or pledgees, were holders of a large amount of drainage warrants redeemed by said bonds; that they were fully apprised of the said bond issue and the discharge resulting therefrom, and that complainant cannot urge that defendant did not assert said discharge, known in its full scope and effect at all times to Van Norden, and never controverted by him, or any warrant-holder.

Twelfth. A denial that the act of 1876 was in any line or word a recognition of the so-called "drainage fund," as it then stood on the records of the city or mortgage office, and had not been discharged in any manner, etc.

Thirteenth. That the dredge-boats and other property acquired by respondent from the company and Van Norden were of little or no value, and, in any event, infinitesimal as compared with the price paid, and that the sale thereof for the amount paid was a fraud upon defendant and its tax-payers.

Fourteenth. That all taxes collected had been faithfully accounted for; that in the suit of Peake *vs.* New Orleans, No. — of the circuit court, defendant had been ordered to render, and had rendered an account of all drainage taxes, and there was no reason to renew the call or order for such account.

Fifteenth. That by the amendment of the constitution of the State of Louisiana proposed by the General Assembly in 1874, and which went into effect January 1st, 1875, the city was prohibited from thereafter increasing its debt in any manner, or from issuing any

evidence of debt, or warrant for the payment of money except against cash in the treasury, the said amendment providing that it should not prevent the issue of drainage warrants, to said Van Norden, transferee of said company, under act No. 30, of 1871, but payable only from drainage taxes.

That said warrants, by the law of their creation payable only from drainage taxes, never, after that amendment, could become part of respondent's debt, nor could any omission of duty on the part of respondent, in respect to drainage, the collection of taxes, nor any act or conduct of respondent, nor any act of the General Assembly, nor purchase of property under said act, bind or obligate respondent, after such amendment, for the payment of any such drainage warrants, or for the purchase price of said property, or for any drainage warrants issued for such price, or for any debt or liability whatever in respect to drainage; nor did said act of 1876, or contract of purchase, attempt to impose on this respondent any such prohibited liability, but in accordance with said amendment, the price of the property directed by said act to be purchased, could be paid only from assessments on private property, out of drainage taxes alone.

Sixteenth. The defense based upon the decree of the circuit court, and of the supreme court, in J. W. Peake *vs.* New Orleans, No. 11614 of the docket of the circuit court, and No. 852 of the October term of 1890 of this court, which decrees of said courts are *res judicata*.

Seventeenth. That the demands of complainant set up in the bill were barred by the prescription or statute of limitation of five years, established by articles 3540 and 3541 of the Revised Civil Code of Louisiana; also by the prescription or statute of limitation of ten years, established by articles 3544 and 3547 of the Civil Code.

22. That after filing of complainant's replication, and the taking of evidence, the cause came on to be heard in the circuit court, and in March, 1898, the circuit court entered a decree in favor of the defendant, dismissing the bill; on March 12th, 1898, complainant was allowed an appeal to the court of appeals; that on April 2d, 1898, the case was called for trial in that court, before Judges Pardee and McCormick, circuit judges, and Swayne, district judge; that on May 17th, 1898, the court made a decree, finding:

First. The city of New Orleans a debtor to complainant in the sum of six thousand dollars, with eight per cent. per annum interest from June 6th, 1876, as stipulated in the warrants sued on, to be paid out of the drainage assessments set forth in the bill.

Second. That said assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, were declared to constitute a trust fund in the hands of the city of New Orleans, for the purpose of paying the claims of complainant, and other holders of the same class of warrants.

Third. That it be referred to one of the masters of the court, to take and state an account of all said drainage assessments; that in taking such account the master was directed to charge the defend-

ant, as well with the amount of drainage assessments against the city, on the areas of the streets, squares and public places, as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected, and properly expended by defendant, in the execution of the trust, but that no offset should be allowed for the bonds issued in exchange for drainage warrants, under the act of 1872.

The opinion of the court was delivered by Swayne, district judge, and was based upon the following considerations:

First. That the attempt of the answer to fasten the responsibility for alleged defects in the drainage plan upon the canal company and Van Norden, as a defense to the action, was entirely unsupported by the evidence.

Second. That the city was a trustee, under the express duty to do whatever was reasonably required to make the drainage fund available; that it was by reason of her own default, in not completing, but abandoning the work, that this was not accomplished; that equity looks upon that as done which ought to have been done; that the city must, therefore, be treated as having done whatever was necessary to render the assessments available, and should be held to account for the drainage fund as if collected and in hand; that the city, under the principles laid down by the Supreme Court of the United States in the present case, was estopped to deny that the assessments upon streets, and other public places, and the judgments thereon, were void *ab initio;* that she was thus estopped to the same extent as she was from setting up the issue of bonds under the act of 1872, as a discharge of her general liability as trustee, with reference to the fund; that as an original proposition, however, the authorities seemed to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of an estoppel.

Third. That by certain decisions of the supreme court of Louisiana, it was held, that the city of New Orleans was liable for the assessments made on the area of streets, under statutes similar in all respects to the acts here involved, except that the assessments in the cases cited had not been ratified by the legislature, as had been done in this instance by the act of 1871; that the matter of local assessments had been the subject of judicial inquiry in other States, notably by the supreme court of Illinois, where all of the objections raised in the present case had been elaborately considered, and decided in harmony with the case above quoted; that whether the obligation for the drainage assessments had its origin in the original acts of 1858, 1859 and 1861, or was cast upon the city by the act of 1871, confirming the assessment-rolls, upon which the city was named as a debtor, or resulted from judgments based on these rolls, the amounts of these assessments constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation, such power being the usual, and in some cases the only, method by which municipal corporations can discharge their indebtedness; citing United States *vs.* New Orleans, 96 U. S., 381; Wolff *vs.* New Orleans, 103 U. S., 358.

Fourth. That the constitutional amendment of 1874, which prohibited the city from increasing her debt in any form, or in any manner, or under any pretext, was no defense, the assumption to that effect being based on the theory that the assessments against the city were at the time void, and that to now enforce them would increase the city's debt; that the court could not concede the correctness of the argument that the city was not, when the amendment went into effect, the primary debtor of the assessments against private property, and that if the court should now impose a liability on the city for the dereliction of duty charged in the bill, it would create a new debt, which would come within the prohibition; the opinion declared that it was true that the amendment prohibited any increase of the city debt, after January 1st, 1875, but it also expressly provided that it should not prevent the issue of drainage warrants to the transferee of the contract, under act 30, of 1871, payable out of drainage taxes; that it seemed clear to the court that by express terms the amendment excluded, and intended to exclude from its operation, the liability of the city growing out of its relation to drainage matters, including the city's liability as assessee of the streets and public places, as shown by the assessment-rolls; that, indeed, it would seem to be that the authority to issue warrants against the drainage fund after that date necessarily implied an affirmance of the right of the city to proceed to the completion of the drainage work then in progress, and to impose a corresponding duty on the city to collect and apply all the drainage assessments to the payment of the warrants, and hence, that these taxes being then liabilities of the city, could not, by any cause or reason, be included in the clause prohibiting the increase of debt, without imputing to the authors of the constitution an intent to defraud those who might deal with it under the invitation of the constitution.

Fifth. That even admitting that the purchase created a debt in excess of the limitation, the most that could be said was that it made an error of law, which, according to article 1846 of the Civil Code of Louisiana, cannot be alleged to acquire the property of another.

Sixth. That the only remaining question which required consideration was the plea of prescription, which the court thought could not be maintained, for the reason that the act of sale created an express trust, in which the city undertook as a trustee to collect and apply the drainage assessments to the payment of warrants for the price of the property sold it; moreover, that it was doubtful whether statutory assessments of the character in question were subject to any prescription at all.

23. From this decree the city of New Orleans obtained an appeal to this honorable court, which was, on the 20th day of October, 1898, dismissed, on the authority of Union & Planters' Bank *vs.* Tennessee, 152 U. S., p. 454, and Sawyer *vs.* Kochersberger, 170 U. S., 303.

24. That it having thus been established, that no appeal lies to this court from the court of appeals, your petitioner is moved to apply to this court for a writ of certiorari in the premises.

That your petitioner is advised and believes that the said judgment of the United States circuit court of appeals for the fifth circuit is erroneous, and that this honorable court should require the said case to be certified to it, for its review and determination, under and in conformity with the provisions of the sixth section of the act of Congress, entitled "An act to establish the circuit courts of appeals, and to defind and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891, the said case being made final in the said circuit court of appeals by said act.

25. That the questions involved in this case are of great gravity and importance; that upon its correct determination depends the liability *vel non* of the defendant for three hundred thousand dollars, with eight per cent. interest per annum from June 6th, 1876, which would amount, at the present time, to a sum in excess of eight hundred and twenty-eight thousand dollars, the question of liability being governed by nice and difficult questions of law and fact, which have been misapplied, or not fully understood by the court of appeals.

26. That the case was decided in said court of appeals, and all of petitioner's defenses, save one—that of *res judicata*, which was not decided at all, nor even mentioned in the opinion,—overruled upon the supposed authority of the opinion of this honorable court in Warner *vs.* New Orleans, 167 U. S., 467; that as a matter of fact, of the numerous defenses set up by petitioner's answer, only one was presented and involved in the case mentioned, and that presented in manner, form and conditions, differing in toto from that involved in Warner *vs.* New Orleans, 167 U. S., 467.

27. That in said case there were certified to this honorable court two questions alone, the first, being whether the city was estopped to plead her bond issue as a payment of her obligation for drainage taxes collected, or which it failed to collect, and of its liability, as assessee of streets and other public places; the second, whether the present case was governed by the decision of your honors in Peake *vs.* New Orleans, 139 U. S., 342; that the first question this honorable court answered in the affirmative, and declined to answer the second at all; hence, the assumption of the court, in the first sentence of its opinion, that, "as to nearly all of the defenses raised, we might well rest our decision on the opinion of the supreme court, expressed in answer to the certified question," is unfounded.

28. That the court erroneously held, that under the principles laid down by your honors in the case above mentioned, that the city was estopped to deny the existence and validity of the assessments against it, as quasi-owner of streets and other public places, to the same extent that it was estopped from setting up the issue of bonds under the act of 1872 as a discharge of its general liability as trustee with reference to that fund, and that whether it be true or not, as the court declares, that the authorities seem to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of any estoppel, it is beyond question that the acts of 1858, 1859 and 1861, under which the as-

sessments were levied, did not contemplate the liability of public property therefor, but were intended to include private property alone; that the language of these statutes would clearly place the assessments on public property in question beyond the reach of the principle which the court declares seemed to be affirmed by the authorities.

29. That the decisions of the supreme court of Louisiana cited in the opinion to sustain the proposition that streets, and property of a like character, were liable to assessment, are all based upon special statutes, presenting no feature in common with those involved here, as concerns the questions at issue.

30. That the court erred in holding that the constitutional amendment of 1874, prohibiting the city from, in any form or in any manner, or under any pretext, increasing its debt, was an authority for, instead of a prohibition against, any increase of debt; that the authority therein contained to draw drainage warrants, payable out of drainage taxes, which the court says necessarily implied an affirmance of the right to proceed to the completion of the drainage work then in progress, and imposed a corresponding duty upon the city to collect and apply all drainage assessments to the payment of warrants, was neither justified nor excused by anything contained in the amendment; the authority to draw the warrants, payable out of drainage taxes alone, following the prohibition of increasing her indebtedness, gave point and emphasis to the latter; the supposed necessary implication, of an affirmance of the right of the city to proceed to the completion of the drainage work which was then in progress, is overborne by the fact that such work was then being conducted not by the city, but by the canal company and Van Norden, the city having no connection with it at all, until after its purchase in 1876, about two years and a half after the amendment was proposed.

31. That the court was mistaken in declaring that the question of prescription was the only one remaining, after having disposed of those mentioned, it having left unnoticed the plea of *res judicata*, set up in the answer; that the prescriptions were that of five years established by article 3540 of the Revised Civil Code of Louisiana, applicable to all effects negotiable or transferrable by endorsement or delivery; that of ten years established by article 3544 of the Revised Civil Code, applying to all personal actions, of any character whatsoever; that of ten years established by article 3547 of the Revised Civil Code, applying to all judgments.

That all these pleas of prescription were overruled by the court, on the single ground that the act of sale created a trust, under which the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the warrants, a ground wholly untenable in Louisiana law, under which, by article 3530 of the Revised Civil Code, to enable a debtor to claim the prescription which operates as a release from debt, it is not necessary that he produce any title, or hold in good faith, the neglect of the creditor alone operating a prescription in such case, and under article 3550, that good faith is not required on the part of a person pleading this prescription; that

these two articles, and that, barring all personal actions by the lapse of ten years, would apply to that part of complainant's bill which sought to hold defendant responsible for its non-collection of assessments due on private property; that the prescription of ten years, by which judgments are extinguished, established by article 3547 of the Revised Civil Code, would have direct application to judgments for drainage taxes against the city herself; that as to these judgments she was not a trustee, but a debtor; that she was charged with no duty of saving them from prescription by suits for their revival, as, in any event, it was legally impossible for her, as plaintiff, to institute a suit against herself, as defendant, for their revival, while article 3547 left with complainant, and those similarly situated, the power, by timely suits for reviving the same, to save such judgments from extinguishment by prescription, the said article allowing any one interested in a judgment to bring a suit for its revival.

32. That besides the numerous defenses set up in the defendant's answer, only three of which are noticed in the opinion of the court of appeals, namely, that the drainage plan of the canal company was fatally defective, and could never furnish the basis for a successful drainage system, that the streets, public squares, etc., were not liable to assessment, and the plea of prescription; defendant pleaded the defense of *res judicata*, based upon the decree of the circuit court, and of this honorable court, in the case of Peake *vs.* The City of New Orleans; that if this plea was well founded, it would have extended the whole length of plaintiff's bill, and would have completely barred all the relief it sought; that the plea was based upon the fact that in the said case of Peake, James Jackson appeared, by intervening bill, as the holder of five purchase warrants identical in character with those sued upon by the complainant, namely, part of those given in payment of the price of the city's purchase of dredge-boats, etc., from the canal company and Van Norden; that the decree in the Peake case was a dismissal of complainant's bill, and of all intervening bills; that the decree upon the warrants sued on by Jackson was decisive of the status of the whole series of purchase warrants.

That this plea of *res judicata* was not mentioned by the court in its opinion, on account of which it may be said that it was not considered, and if so, defendant has had no hearing upon this branch of its case.

33. That the court was grossly in error in decreeing that the city was the absolute debtor of the drainage warrants sued upon; that all the bill sought to do was to obtain an accounting of the drainage taxes; that in no event were the drainage warrants sued upon to be considered unconditional obligations of the city until it was shown that all of the taxes had been lost, misappropriated or misapplied by the city, even if then, which is denied.

34. That in the circuit court of appeals, as part of its petition for a rehearing, defendant filed an assignment of errors for the purposes thereof; that it was in words and figures as follows, to wit:

First. That this honorable court, the United States circuit court of appeals for the fifth circuit, is and was without jurisdiction to

hear and determine this cause; that the case involves the construction and application of the Constitution of the United States, especially section 10 of article 1, and also the 14th amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which involves the construction or application of the Constitution of the United States.

That in this case certain laws of the State of Louisiana are claimed to be in contravention of the Constitution of the United States, to wit: That by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the General Assembly of the State of Louisiana, No. 48, of the year 1877, excluding certain lands from all liability for drainage taxes and cancelling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the General Assembly of the State of Louisiana, No. 67, of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed, and section 42 of act No. 20 of the General Assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the city of New Orleans or portions thereof and the collection of drainage-tax assessments are unconstitutional, null, and void because repugnant to the Constitution of the United States, especially section 10 of article 1 and the 14th amendment of that Constitution, prohibiting all State legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *vs.* City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-liability of the city for assessments against streets, public squares, and property of a like character; the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescription and *res judicata*, that while the case of Peake *vs.* City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, the plea could only be sustained by evidence, and hence the court could on the demurrer have no knowledge of its scope; in any event the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the de-

murrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata*.

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estoppel it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard; and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of the New Orleans Drainage Co., 11 An., 338; Marquez *vs.* City of New Orleans, 13 An., 319; Correjolles *vs.* Succession of Foucher, 26 An., 362; Barber Asphalt Paving Co. *vs.* Gogreve, 41 An., 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean *vs.* City of Bloomington, 106 Ill., 209.

Eighth. That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no farther than to those issued under act No. 30, of 1871, and by no interpretation could be held to include warrants issued under the subsequent act No. 16, of 1876; that the said assessments against public property were not confirmed by act No. 30, of 1871, such confirmation as may have been given by said act having reference exclusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi & Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to

which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876, or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the State of Louisiana; that the statutes of limitations of the several States and the interpretation given them by the highest court of the State in question are binding as rules of decision in the Federal courts; that the laws of prescription of the State of *the* Louisiana and their construction given by the supreme court of this State, so far as they operate as a release from debt, depend for their application solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute without further condition constitutes a complete defense; hence, even if the city, as erroneously held by your honors, was a trustee, the plea of prescription as against the said assessments against public property and the judgments therefor should have been maintained; that the case of Insurance Company *vs.* Pike, 32 An., 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but, on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessment against herself is error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant, to revive a judgment against herself; that this would not leave complainant without a remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival, so that it is the warrant-holders, and not the city who have allowed the said judgments to prescribe. The city was absolutely without power to revive them, while the warrant-holders were free to have done so. In consequence of this and other considerations the cases of the Succession of Farmer, 32 An., 1037; McKnight *vs.* Calhoun, 36 An., 408, to the effect that the prescription of debts due by a succession to its administrator and *vice versa* is suspended, while the administration continues, are without applica-

tion here; that whether or not the assessments as originally made, are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character; that the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code, the case of Reed *vs.* His Creditors, 39 An., 115, citing State *vs.* Jackson, 34 An., 178, and Davidson *vs.* Lindop, 36 An., 767, construing, as they do the particular provisions of special statutes presenting no feature in common with those presented here, the statutes interpreted by those cases, differing in toto from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and hence furnish no authority upon the question of prescription here at issue.

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decree of the United States Supreme Court and of the circuit court for the fifth circuit and eastern district of Louisiana, in the case of James W. Peake *vs.* City of New Orleans, No. 11614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, pages 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed, in any event, the amount of its bond issue, described in the answer as a creditor in her favor, on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opinion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer; the record at that time necessarily did not and could not make the showing of facts which is now before the court, namely, that Van Norden, the vendor of the city, received, either himself personally or through his employees, assignees, or transferees, the entire issue of the bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record; the bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence, was a diminution of the outstanding drainage fund; and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal conse-

quences of a certain act, against which the laws of Louisiana does not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, as shown by your honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake *vs.* New Orleans, 139 U. S., 342, the Supreme Court held that the city had the right to abandon the work of drainage—that such an abandonment was no cause of liability to warrant-holders; that while the opinion was with reference to work of construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defense, the court erred.

Fourteenth. That the court erred in holding that the city of New Orleans was a debtor of John G. Warner, the complainant, in the sum of six thousand dollars, with eight per cent. interest from January 6th, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warren Van Norden, transferee, to said city, under the authority of act 16 of the legislature of the State of Louisiana, approved February 24th, 1876.

Sixteenth. That the court erred in holding that the city in any mode, should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city, in any event, for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to give due effect to the appointment of a receiver for drainage taxes. This suit, if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the General Assembly of the State of Louisiana, Nos. 48 and 67, of 1877, and section 40 of act No. 20, of 1882, were full and complete authority and justification of the city of New Orleans for having abandoned the work of drainage, and also a full defense to the liability asserted in this suit against her for any non-collection of drainage taxes.

That this assignment of errors, petitioner prays this court to take and consider as its assignment of errors, along with errors set out

in this petition, as an assignment of errors for the purposes of this petition.

35. The court was also in error in allowing interest at eight per cent. per annum upon the warrants sued upon from June 6th, 1876, making over twenty-two years, which would amount now to over one hundred and seventy-six per cent.; that neither act No. 16 of 1876, nor the contract of sale thereunder, provides for the payment of interest, and the stipulation for the payment of interest contained in the warrants was without authority of law, the administrators of accounts and finance having no power to exceed the statute, and the contract, under which the warrants were issued.

36. That whether or not the said plea of *res adjudicata* was well founded, is to be determined by the scope and effect of the finding and decision of this court in the said case of Peake *vs.* New Orleans; that the proper construction of your honors' decision in that case is a subject peculiarly within the supervisory power of this court; and that such power should be here exercised in the interest of jurisprudence and uniformity of decision, and as well also in furtherance of justice.

37. That the contract upon which is founded the liability sought to be established against the city, was grossly unfair and inequitable in reference to the latter; that the dredge-boats, derricks and other property, sold to the city in 1876 for three hundred thousand dollars, payable in drainage warrants, had been acquired by Van Norden from the canal company in 1872 for fifty thousand dollars; that during the intervening time, the boats and other drainage paraphernalia had been in almost constant use, and, from the averments of the bill as to the number of canals dug and levees built, it is evident that they were worked to their utmost capacity; that this in no sense tended to increase their value, as placed upon them by Van Norden and the canal company in the purchase from the latter by the former in 1872; that this, notwithstanding, the same property was sold to the city by Van Norden in 1876 for an amount in drainage warrants exceeding by five times the sum which he had paid for them nearly four years previously.

Your petitioner thus respectfully submits, that the questions involved in the determination of the controversy in this suit, are of such gravity and importance, and their treatment by the court of appeals was such, as justifies petitioner, in the furtherance of justice, to invoke the power of this court, that they may be authoritatively and finally adjudged upon, after a full presentation of the merits.

Wherefore, petitioner respectfully prays, that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the fifth circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said circuit court of appeals, in said case, therein entitled John G. Warner *vs.* City of New Orleans, No. 691, to the end that said case may be reviewed and determined by this court, as provided by section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and

to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decree of the said circuit court of appeals in said suit, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray, etc.

UNITED STATES OF AMERICA, }
State of Louisiana, City of New Orleans. }

Walter C. Flower, being duly sworn, deposes and says: That he is the mayor of The City of New Orleans, defendant in the suit of John G. Warner *vs.* The City of New Orleans, No. 691 of the docket of the United States circuit court of appeals for the fifth circuit; that he has read the foregoing petition, and the facts therein stated are true to the best of his knowledge and belief.

UNITED STATES OF AMERICA, }
State of Louisiana, City of New Orleans. }

Samuel L. Gilmore, being duly sworn, deposes and says: That he is city attorney of the city of New Orleans; that as such he had personal charge for the said city of the case in the foregoing petition mentioned, in the United States circuit court of appeals for the fifth circuit; that he has read the said petition, by him subscribed, and the facts therein stated are true, to the best of his knowledge and belief.

Office Supreme Court U. S. Filed Mar. 14, 1899. James H. McKenney, Clerk.

In the Supreme Court of the United States, October Term, 1899.

THE CITY OF NEW ORLEANS, Petitioner, }
vs. } No. 172.
JOHN G. WARNER. }

On writ of certiorari to the United States circuit court of appeals for the fifth circuit.

Assignment of Errors.

First. That the United States circuit court of appeals for the fifth circuit is and was without jurisdiction to hear and determine this cause; that the case involves the construction and application of the Constitution of the United States, especially section 10 of article 1, and also the fourteenth amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which

involves the construction or application of the Constitution of the United States.

That in this case certain laws of the State of Louisiana are claimed to be in contravention of the Constitution of the United States, to wit, that by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the General Assembly of the State of Louisiana, No. 48 of the year 1877, excluding certain lands from all liability for drainage taxes and canceling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the General Assembly of the State of Louisiana, No. 67 of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed, and section 42 of act No. 20 of the General Assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the city of New Orleans or portions thereof and the collection of drainage-tax assessments are unconstitutional, null, and void, because repugnant to the Constitution of the United States, especially section 10 of article 1 and the fourteenth amendment of that Constitution, prohibiting all State legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *vs.* City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-liability of the city for assessments against streets, public squares, and property of a like character, the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescription and *res judicata;* that while the case of Peake *vs.* City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, the plea could only be sustained by evidence, and hence the court could on the demurrer have no knowledge of its scope. In any event, the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the demurrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata.*

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that the city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing

warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estopped it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard, and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of the New Orleans Drainage Co., 11 An., 338; Marquez *vs.* City of New Orleans, 13 An., 319; Correjolles *vs.* Succession of Foucher, 26 An., 362; Barber Asphalt Paving Co. *vs.* Gogreve, 41 An., 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean *vs.* City of Bloomington, 106 Ill., 209.

Eighth. That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no farther than to those issued under act No. 30 of 1871, and by no interpretation could be held to include warrants issued under the subsequent act, No. 16 of 1876; that the said assessments against public property were not confirmed by act No. 30 of 1871, such confirmation as may have been given by said act having reference exclusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876 or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property

and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the State of Louisiana; that the statutes of limitations of the several States and the interpretation given them by the highest court of the State in question are binding as rules of decision in the Federal courts; that the laws of prescription of the State of Louisiana and their construction given by the supreme court of this State, so far as they operate as a release from debt, depend for their application solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute, without further condition, constitutes a complete defense. Hence, even if the city, as erroneously held by your honors, was a trustee, the plea of prescription as against the said assessments against public property and the judgments therefor should have been maintained; that the case of Insurance Company *vs.* Pike, 32 An., 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but, on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessment against herself is error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant to revive a judgment against herself; that this would not leave complainant without a remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival; so that it is the warrant-holders and not the city who have allowed the said judgments to prescribe. The city was absolutely without power to revive them, while the warrant-holders were free to have done so. In consequence of this and other considerations the cases of the Succession of Farmer, 32 An., 1037; McKnight *vs.* Calhoun, 36 An., 408, to the effect that the prescription of debts due by a succession to its administrator and *vice versa* is suspended, while the administration continues, are without application here; that whether or not the assessments as originally made are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character. That the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code the case of Reed *vs.* His Creditors, 39 An., 115, citing State *vs.* Jackson, 34 An., 178, and Davidson *vs.* Lindop, 36 An., 767, construing, as they do, the par-

ticular provisions of special statutes presenting no feature in common with those presented here; the statutes interpreted by those cases differing in toto from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and hence furnish no authority upon the question of prescription here at issue.

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decree of the United States Supreme Court and of the circuit court for the fifth circuit and eastern district of Louisiana in the case of James W. Peake *vs.* City of New Orleans, No. 11614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, pages 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed in any event the amount of its bond issue, described in the answer as a credit in her favor, on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opinion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer. The record at that time necessarily did not and could not make the showing of facts which is now before the court, namely, that Van Norden, the vendor of the city, received, either himself personally or through his employés, assignees, or transferees, the entire issue of the bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record. The bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence was a diminution of the outstanding drainage fund, and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal consequences of a certain act, against which the laws of Louisiana do*es* not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, as shown by your honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake *vs.* New Orleans, 139 U. S., 342, the Supreme Court held that the city had the right to abandon the work of drainage; that such an abandonment was no cause of liability to

warrant-holders; that while the opinion was with reference to work or construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defense the court erred.

Fourteenth. That the court erred in holding that the city of New Orleans was a debtor of John G. Warner, the complainant, in the sum of six thousand dollars, with eight per cent. interest, from January 6, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warren Van Norden, transferee, to said city, under the authority of act 16 of the legislature of the State of Louisiana, approved February 24, 1876.

Sixteenth. That the court erred in holding that the city in any mode should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city in any event for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to give due effect to the appointment of a receiver for drainage taxes. This suit, if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the General Assembly of the State of Louisiana, Nos. 48 and 67 of 1877 and section 40 of act No. 20 of 1882, were full and complete authority and justification of the city of New Orleans for having abandoned the work of drainage, and also a full defense to the liability asserted in this suit against her for any non-collection of drainage taxes.

SAMUEL L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Petitioner.

Office Supreme Court U. S. Filed May 14, 1900. James H. McKenney, Clerk.

In the Supreme Court of the United States, October Term, 1900.

THE CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER, JOHN CROSSLEY'S SONS, THE SUFFOLK National Bank, Francis James Gasquet, Wilder & Company, Mrs. Frank N. Butler, in Her Individual Capacity as Widow in Community and as Executrix of the Last Will and Testament of Frank N. Butler, Her Deceased Husband; Mrs. Mary E. Taliafero, and Mrs. Eliza J. Lytle, Dative Tutrix, Respondents. } No. 281.

Petition for writ of certiorari requiring the United States court of appeals for the fifth circuit to certify to the Supreme Court of the United States for its review and determination the case of City of New Orleans, appellant, *vs.* John G. Warner *et als.*, appellees, No. 928, November term, 1899.

In the Supreme Court of the United States, October Term, 1899.

THE CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER, JOHN CROSSLEY'S SONS, THE SUFFOLK National Bank, Francis James Gasquet, Wilder & Company, Mrs. Frank N. Butler, in Her Individual Capacity as Widow in Community and as Executrix of the Last Will and Testament of Frank N. Butler, Her Deceased Husband; Mrs. Mary E. Taliafero, and Mrs. Eliza J. Lytle, Dative Tutrix, Respondents. } No. —.

Petition for writ of certiorari requiring the United States court of appeals for the fifth circuit to certify to the Supreme Court of the United States for its review and determination the case of City of New Orleans, appellant, *vs.* John G. Warner *et als.*, appellees, No. 928, November term, 1899.

To the honorable the Supreme Court of the United States:

The petition of the city of New Orleans, a municipal corporation, created by the act of the General Assembly of the State of Louisiana No. 45 of its session in 1896, respectfully shows:

That complainant, Warner, on November 26, 1894, filed his bill in the circuit court, setting forth in substance that he was the holder and owner of three warrants on the city of New Orleans, issued under a certain contract made June 6, 1876, for the purchase from the Mississippi and Mexican Gulf Ship Canal Company, and Van Norden, its transferree, of its rights, franchises, tools, implements, machines, boats and apparatus, the price whereof was to be paid in drainage warrants, payable out of drainage taxes, imposed under

various acts of the legislature set out in the bill; that the price of the sale was three hundred thousand dollars in such warrants. The bill further set up that the said contract of purchase was made under authority of act No. 16 of the General Assembly, of Louisiana, approved March 24, 1876, and that by the contract thereunder the city of New Orleans was to complete the system of drainage which had then been partially constructed by the said company and Van Norden, and to collect the drainage taxes which had been imposed to provide for the expense of establishing the system; that the city of New Orleans, from the date of its said purchase, ceased to do all work on said system, and never, thereafter, commenced or prosecuted any other, but sold some of the boats and machinery so purchased, diverted the proceeds of the drainage taxes to unauthorized purposes, and allowed others of the said boats to rot and sink, unused.

After charging other acts in violation of the city's contract of 1876, the bill concluded with a prayer for the taking of an account of all drainage taxes, assessments and judgments, imposed under certain named statutes, and of all moneys collected by the city on account of the same, as well as all payments, disbursements and dispositions thereof; for all loss, waste and damage caused by the city to the said assessments and judgments, by reason of her illegal and wrongful acts in violation of the duties and obligations imposed on her by said act of sale of June 6, 1876; and that the sum found to be due on said accounting, with interest, be decreed to be paid over to plaintiff, and other parties similarly situated, to the full extent of their warrants, with interest, and other germane relief.

To this bill the city filed a demurrer, general and special, under which it was claimed that she was entitled to plead, against any asserted liability on account of the warrants sued on, her issue in 1873 of $1,672,105.21 of bonds, to retire that amount of drainage warrants, on the ground that, that, if not a discharge of any and all liability by her to the drainage fund, was at least a payment of any sum for which she, herself, might be a debtor to that fund, on account of drainage assessments against streets, squares, public places, and other property of a like character; also that the decision of the Supreme Court, in the case of James W. Peake *vs.* City of New Orleans, 139 U. S., p. 342, was *res adjudicata* against complainant, as to all the matters and things set out in his bill.

The demurrer was sustained by the circuit court, and the cause being brought to the court of appeals for the fifth circuit, by appeal, it was by that court certified to the Supreme Court of the United States, to obtain its instructions as to the two points relied upon by the city, as above stated.

Warner *vs.* City of New Orleans, 167 U. S., 467 *et seq.*

The Supreme Court held, that the city could not plead her bond issue as a set-off or payment, as to any liability sought to be established by the bill; the second question it declined to answer.

See Warner *vs.* New Orleans, 167 U. S., 467 *et seq.*

Thereupon, after the filing of the mandate of the Supreme Court, the court of appeals overruled the demurrer, on the ground, besides

that furnished by the Supreme Court's opinion, that the case of Peake *vs.* New Orleans did not necessarily apply to the facts of this case, nor operate to defeat complainant's action.

See Warner *vs.* New Orleans, 81 Fed. Rep., 645.

The city having filed its answer in the circuit court, after the taking of evidence, the cause came on for a hearing, which resulted in a decree of the circuit court, dismissing the bill; from this decree an appeal was taken to the court of appeals, by which it was reversed and one entered in favor of complainant; the case was then carried by certiorari to the Supreme Court of the United States, which affirmed the judgment of the court of appeals.

See Warner *vs.* New Orleans, 175 U. S., 120.

Thereupon there was a reference to a special master, for the purpose of ascertaining the amount of drainage funds for which the city was liable under the last decree, and also what other persons, besides complainant, as holders of drainage warrants, were entitled to the benefits of the decree; the master reported that the city was liable for an amount somewhat in excess of two millions of dollars of drainage taxes, composed, in part, of assessments levied against private property, which she failed to collect, and also in part of drainage assessments levied against streets, public squares, public places, etc., of which she was found the debtor.

The master also reported that the following parties, holders of drainage warrants, of the same class and kind as those held by relator, should, in common with him, be paid the amounts represented by their said warrants, to wit:

1st. John Crossley & Son, 58 warrants, aggregating...	$149,000 00
2nd. Wilder & Co., 2 warrants, in judgment, aggregating	7,000 00
3rd. F. J. Gasquet, 6 warrants, aggregating.....	30,000 00
4th. The Suffolk national bank, of Boston, 6 warrants, aggregating	60,000 00
5th. Frank N. Butler and Mary E. Taliafero, 1 warrant, for	5,000 00
6th. John J. Donaldson, 1 warrant, for	2,000 00
7th. Mrs. Eliza J. Lyttle, dative tutrix, 3 warrants, for..	12,000 00

Said sums to bear interest at 8 per cent. per annum from June 7, 1876.

To this report defendant filed the following exceptions:

First. That there was error in charging defendant with liability for the whole of the uncollected assessments against private property, of property owned by private persons, because the evidence before master showed that all such taxes as could be, or were susceptible of collection, have been collected and paid over to the parties and purposes for which they were assessed.

Second. That the advantages of the decree under which the reference is made, extended only to such warrants as were issued in payment of the property purchased by the act before G. Le Gardeur,

notary public, of date June 7, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750, and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the circuit court of appeals and of the Supreme Court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden against the city of New Orleans; that of said warrants, besides those issued in settlement of said claim for damages, the sum of twenty thousand dollars was issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the city of New Orleans, prior to June 6, 1876, and applied to general-fund purposes, and hence, that as to those warrants, in any event, there could be no recovery or allowance made; that in any event, the decree in the suit of J. W. Peake *vs.* City of New Orleans, No. 11614, of the United States circuit court for the eastern district of Louisiana, in *res judicata*, in favor of this defendant.

That although there is no mark or sign upon any of the said warrants, which were issued in payment of the price of the property purchased, which were given in settlement of the claim for damages, and which were executed and delivered in payment for drainage work, which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payment of the price of the said property, and what were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution; first, for the payment of the price of the property purchased; next, to the settlement of the claim for damages, and lastly for the payment for work mentioned in said notarial act; that all of said warrants bear date June 6, 1876, the first one bearing the number 313, and run up to and inclusive of the number 402, as is shown by the statement of the said warrants themselves, offered in evidence.

That from an examination of the said warrants, and a comparison of their numbers, it will be seen that with the issuance of warrant No. 332 there had been reached an issue of $150,000, adding to which warrant 333 for $5,000, would make a total issue of $155,000, or a difference of $1,250 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

After hearing, these exceptions were overruled and a final decree entered, declaring the city a debtor to the drainage fund in the sum of $1,850,336.52, this being the amount, with interest, of the assessments against public property alone, no note being taken in the decree of the amount for which the master's report had found a liability for the assessments on private property; drainage warrants held by complainant, and other intervening warrant-holders, to the extent of $271,000, with interest thereon at 6 per cent. per annum, from

June 6, 1876, amounting in all to about $791,000, were decreed to be payable out of the fund so established.

From this decree the city took an appeal to the court of appeals.

The assignment of errors for said appeal, sets up the same grounds appearing in the exceptions to the master's report.

The first one sets out that the court erred in overruling, and refusing to sustain the exceptions; that the same should have been maintained, and that there should have been a decree in favor of respondent; the other six assignments, set out in detail, the specific errors in the court's finding, and the special grounds relied upon for a reversal.

That on April 30th, 1900, the said court of appeals, for the fifth circuit, entered a decree, affirming that of the circuit court, for the reasons that all the issues raised in the circuit court, and upon the appeal from its decree, had been decided and foreclosed against the city of New Orleans by the Supreme Court of the United States, by its decree in Warner *vs.* City of New Orleans, 167 U. S., p. 467, and City of New Orleans *vs.* Warner, 175 U. S., p. 120.

That in the said circuit court, at the same time that petitioner applied for and obtained its order of appeal, it filed, in connection with its motion therefore, the following assignment of errors:

First. That the court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this court on the — day of March, 1900; that the court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second. That from the evidence before the court, accompanying the said report, it conclusively appeared that the dredge-boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the city of New Orleans from Warner Van Norden and the Mexican Gulf and Ship Canal Company, by authentic act before G. Le Gardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750.00, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the city of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third. That as to the $20,000.00 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the city of New Orleans to other than drainage-fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of the court of appeals, or of the Supreme Court of the United States, in this cause, that the circuit

court erred in admitting them to any participation in the fund ascertained by the master to be due by the city of New Orleans, or to their payment out of the same.

Fourth. That as to the remainder of the $320,000.00 issued, as shown by the said act of sale from Van Norden and said company to the city of New Orleans, that is, the residue after deducting the said $153,750.00, the value of the dredge-boats, etc., and $20,000.00, in satisfaction of drainage taxes claimed to have been diverted, to wit: $146,250.00, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the city of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work, by the city of New Orleans, required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750.00, while, as a matter of fact, the whole amount of the $320,000.00 of warrants issued by the city *were* decreed to be payable out of the said funds, save $4,000.00 thereof, which has been paid, in which finding the court was in error.

Fifth. That warrants to the extent only of $153,750.00 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth. That the court, refusing to separate the valid from the

illegal warrants, dealt with the entire issue on a unit, in which there was error; that the court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750.00, ascertained as aforesaid.

Seventh. That the court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decrees of this cause, made and entered by this court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been considered by this court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either court; that the circuit court erred in so holding, and should have held the reverse.

That petitioner also incorporated the said assignments of error in its application for a rehearing made herein to the said circuit court of appeals.

That in the opinion and decree of the said circuit court of appeals there was error to the prejudice of petitioner in the following particulars, to wit:

First. That the grounds of exception to the master's report filed by petitioner in the circuit court, and the issues raised by such exceptions, had not been decided adversely to the city of New Orleans, or foreclosed against her, in Warner *vs.* New Orleans, 167 U. S., p. 467, and New Orleans *vs.* Warner, 175 U. S., p. 120; and that the court of appeals erred in holding the reverse; that, on the contrary, no such questions were raised, much less decided, in the case first mentioned, and that in the cause secondly mentioned, although some of the issues presented by said exceptions were urged upon the court, the latter, by its opinion, expressly declined to consider them; and, further, the precise issues presented herein were not made, much less passed upon, by the Supreme Court, in the case secondly mentioned.

Second. That the principle declared by the two said cases was that the drainage warrants in question here, so far as issued in payment of the price of property, were obligations of the city of New Orleans; that the Supreme Court did not decide, in either of said cases, that warrants issued in settlement of, or attributable to, the payment of any claim for damages held by the Mississippi and Mexican Gulf Ship Canal Company or Warner Van Norden against the city of New Orleans, were obligations of the latter, or entitled to the same rights and privileges as warrants issued in payment of the price of property; that the court of appeals for the fifth circuit erred in not so holding, and also in holding as it did.

Third. That no warrants should be considered as having been issued in payment of the price of the franchise of the said company, as the same was of no value to the city of New Orleans, and its acquisition by the latter gave it nothing of any value, but was, on the contrary, the assumption by it of an onerous burden, to wit: the completion of the drainage work at its own expense, for which work the company and Van Norden were entitled to charge fifty cents per square yard for canal excavation and levee building, which charges,

however, they had never been able to collect, except in an insignificant amount, thus throwing upon the company and Van Norden the loss of many hundreds of thousands of dollars; thus relieving them of a burdensome and unprofitable duty, and the court of appeals erred in holding that the contrary held by the Supreme Court, as that the said franchise was to be considered, as in part, a consideration for any of said warrants.

Fourth. That the item of twenty thousand dollars of drainage warrants, issued in settlement of the amount of drainage taxes said to have been diverted or used by the city of New Orleans for purposes other than the retirement of drainage warrants, prior to June 7th, 1876, the date of the city's purchase, was in reality entirely beyond the authority given the city by act No. 16 of 1876, and the substitution of so many so-called "purchase" warrants for a corresponding amount of warrants issued to Van Norden and the said company, in payment for work done, which latter class of warrants it was decreed that the city could not be compelled to pay, in the case of J. W. Peake *vs.* City of New Orleans, No. — of the docket of this court of its October term of 1890.

Fifth. That the said court erred in not sustaining the assignment of errors upon which the reversal of the decree of the circuit court was asked, which said assignment of errors was as follows, to wit:

First. That the court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this court on the — day of March, 1900; that the court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second. That from the evidence before the court, accompanying the said report, it conclusively appeared that the dredge-boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the city of New Orleans from Warner Van Norden and the Mexican Gulf and Ship Canal Company, by authentic act before G. Le Gardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750.00, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the city of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment of, or participation in, the said fund, because they were in no sense "purchase" warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third. That as to the $20,000.00 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the city of New Orleans to other than drainage-fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of

the findings of this court, or of the Supreme Court of the United States, in this cause; that the circuit court erred in admitting them to any participation in the fund ascertained by the master to be due by the city of New Orleans, or to their payment out of the same.

Fourth. That as to the remainder of the $320,000.00 issued, as shown by the said act of sale from Van Norden and said company to the city of New Orleans, that is, the residue after deducting the said $153,750.00, the value of the dredge-boats, etc., and $20,000.00 in satisfaction of drainage taxes claimed to have been diverted, to wit: $146,250.00, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the city of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work by the city of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that, in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750.00, while, as a matter of fact, the whole amount of the $320,000.00 of warrants issued by the city *were* decreed to be payable out of the said funds, save $4,000.00 thereof, which had been paid, in which finding the court was in error.

Fifth. That warrants to the extent only of $153,750.00 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth. That the court, refusing to separate the valid from the

illegal warrants, dealt with the entire issue as a unit, in which there was error; that the court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750.00, ascertained as aforesaid.

Seventh. That the court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decrees in this cause, made and entered by this court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been considered by this court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either court; that the circuit court erred in so holding, and should have held the reverse.

Your petitioner thus respectfully submits that the questions involved in the determination of the controversy in this suit, are of such gravity and importance, and their treatment by the court of appeals was such, as justifies petitioner, in the furtherance of justice, to invoke the power of this court, that they may be authoritatively and finally adjudged upon, after a full presentation of the merits.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the fifth circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said circuit court of appeals, in said case, therein entitled City of New Orleans *vs.* John G. Warner *et als.*, No. 928, to the end that said case may be reviewed and determined by this court, as provided by section 6 of the act of Congress entitled, "An act to establish circuit courts of appeals, and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3rd, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decree of the said circuit court of appeals in said suit, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray, etc.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans.

Paul Capdievielle, being duly sworn, deposes and says: That he is the mayor of The City of New Orleans, plaintiff in the suit of City of New Orleans *vs.* John G. Warner *et als.*, No. 928 of the docket of the United States circuit court of appeals for the fifth circuit; that he has read the foregoing petition, and the facts therein stated are true to the best of his knowledge and belief.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans.

Samuel L. Gilmore, being duly sworn, deposes and says: That he is city attorney of the city of New Orleans; that as such he had

personal charge for the said city of the case in the foregoing petition mentioned, in the United States circuit court of appeals, for the fifth circuit; that he has read the said petition, by him subscribed, and the facts therein stated are true, to the best of his knowledge and belief.

Office Supreme Court U. S. Filed May 14, 1900. James H. McKenney, Clerk.

United States Supreme Court, October Term, 1900.

CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER ET ALS., Respondents. } No. 281.

On application for writ of certiorari.

Answer of Respondent.

Richard De Gray, J. D. Rouse, William Grant, solicitors for respondents.

United States Supreme Court, October Term, 1899.

CITY OF NEW ORLEANS, a Municipal Corporation, Petitioner,
versus
JOHN G. WARNER ET ALS., Respondents. } No. —.

Now comes the respondents in the above-entitled proceeding, and for answer to the petition of the city of New Orleans praying for a writ of certiorari, say:

I.

That the statement of the proceedings had in the suit of John G. Warner *et als. versus* The City of New Orleans, in the circuit court of the United States for the eastern district of Louisiana, and in the United States circuit court of appeals, as set forth in said petition, is substantially true, save and except that the said petitioner has omitted to state the fact that the appeal of the city from the said decree of the circuit court in favor of these respondents, dated March 26, 1900, was allowed, and taken to the said court of appeals, without a supersedeas, as appears from the order of the circuit court granting said appeal (present Record, p. 68); the said City of New Orleans having given bond for costs only, but without any stipulation securing the amount of said decree, as required by law, to suspend execution. And so respondents submit that if a writ of certiorari is granted herein, it should be expressly provided that the granting of the writ shall not operate to suspend or delay the execution of the said decree of March 26, 1900, unless the said petitioner shall give security for the principal and interest due respondents under said decree, now amounting to the sum of, say $791,000.

II.

These respondents deny that the master erred in allowing the claims of the holders of the warrants issued under the agreement of sale and compromise made between the city of New Orleans and the Mexican Gulf Ship Island Canal Company and Warner Van Norden, transferee, all of said warrants being of the same kind and class, and issued upon the same consideration as those held by John G. Warner, complainant, in the original suit; and they deny that the circuit court erred in overruling the exceptions to the master's report and in making the decree of March 26, 1900, or that the United States circuit court of appeals erred in affirming said decree. And respondents specially aver that in allowing the claims of the warrant-holders, the master strictly followed, as it was his duty to do, the requirements of the decree of December 5, 1898, as affirmed by this honorable court in the case of The City of New Orleans *vs.* John G. Warner, 175 U. S., 120; 176 U. S., p. 92.

III.

Respondents further submit that the city of New Orleans having been fully heard upon all the numerous defenses set up in its answer to the original bill of the said Warner, filed in behalf of himself and your respondents, holding the same class of warrants, should not now be permitted to set up other and further defenses before the master, impeaching the decree of December 5, 1898, affirmed by this court, under which the master proceeded. Respondents are advised, in this connection, that neither the master, nor the circuit court, nor the court of appeals, could lawfully disregard the decision of this court, and deny to warrant-holders the right to claim the benefit of said decree. And they further suggest that, according to settled practice and usage, this court will not itself review, reverse, or modify its own decrees upon a second appeal.

Wherefore respondents pray that the application of the petitioner, The City of New Orleans, for a writ of certiorari be denied, with costs; but that in case this honorable court is pleased to allow said writ, it be expressly ordered that the allowance shall not suspend the execution of the decree sought to be reviewed, unless the petitioner shall give security for the amount due respondents thereunder, in principal and interest, now amounting to $791,000.

Respectfully submitted.

R. DE GRAY,
J. D. ROUSE,
WM. GRANT,
Solicitors for Respondents.

William Grant, being duly sworn, says that he is one of the solicitors for the respondents in this cause, and that the statements contained in the foregoing answer are true, to his own knowledge.

WM. GRANT.

Subscribed and sworn to before me this — day of May, 1900.

——, ——,
Notary Public.

Office Supreme Court U. S. Filed May 14, 1900. James H. McKenney, Clerk.

United States Supreme Court, October Term, 1900.

THE CITY OF NEW ORLEANS, Petitioner,
versus
JOHN G. WARNER ET ALS., Respondents. } No. 281.

On petition for certiorari to United States circuit court of appeals for the fifth circuit.

Caption.

UNITED STATES OF AMERICA,
Fifth Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth judicial circuit, begun on the third Monday of November, 1899, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David Shelby, United States circuit judges for the fifth judicial circuit.

THE CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees.

Be it remembered that heretofore to wit, on the 7th day of April, 1900, a transcript of the record from the circuit court of the United States for the eastern district of Louisiana, was filed in the office of the clerk of the United States circuit court of appeals, for the fifth circuit, in the words and figures following, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER ET ALS., Appellees,
versus
THE CITY OF NEW ORLEANS, Appellant. } No. 12350.

Richard De Gray, Esquire, and Rouse & Grant, Esquires, for appellees.

Samuel L. Gilmore, Esquire, city attorney, and Branch K. Miller, Esquire, for appellant.

Appeal from decree on exceptions to master's report on claims of warrant-holders.

Appeal from the circuit court of the United States in and for the fifth circuit and eastern district of Louisiana to the United States circuit court of appeals for the fifth circuit, returnable within thirty (30) days from the sixth (6th) day of April, A. D. one thousand-nine hundred, at the city of New Orleans, State of Louisiana.

Transcript of Appeal.

Motion to file mandate of U. S. circuit court of appeals and to enter judgment in accordance therewith and appointment of master.

Entered and filed December 5, 1898.

United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray and Rouse & Grant, solicitors for complainant in the above-entitled cause and upon their suggesting that the final decree rendered herein by this hon. court on the 8th day of March, 1898, has been reversed by the United States circuit court of appeals for the fifth circuit, as will more fully appear by the mandate of said court presented herewith.

It is now ordered that said mandate be filed, and in accordance with the directions therein contained that the decree of this hon. court of said 8th day of March, 1898, in favor of the defendant, The City of New Orleans, and dismissing complainant's suit with costs, be now annulled and set aside with all costs of this suit, and in accordance with said mandate it is now further ordered, adjudged and decreed as follows, to wit:

1. It is decreed that the city of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 per cent. interest thereon from June 6, 1876, as stipulated in the warrants sued on,

and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be and the same are hereby declared to constitute a trust fund in the hands of the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of act No. 16 of the legislature of the State of Louisiana approved February 24, 1876.

3. That it be referred to A. G. Brice, Esq., one of the masters of the court, to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments by any person having possession thereof and to examine witnesses touching all such matters.

In taking and stating said account said master is directed to charge the defendant as well with the amount of drainage assessments against the city on the areas of the streets, squares, and public places as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice, by advertisement in a newspaper published in the city of New Orleans, to holders of warrants issued as aforesaid, to appear before him and establish their claims.

And it is further ordered that said warrant-holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions or to obtain special leave from the court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

5. It is further decreed that upon the coming in of the master's report and its confirmation the complainant and all those who have established their claims under the fourth clause of this decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full then for the proper *pro rata* thereof, and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interest have leave to apply to the court for such other and further orders as may be necessary from time to time to carry this decree into full effect, and that the defendant pay all costs of this suit.

(Signed) ALECK BOARMAN, *Judge.*

New Orleans, Dec. 5, 1898.

Mandate filed December 5, 1898.

UNITED STATES OF AMERICA *ss.*:

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Louisiana, Greeting:

Whereas, lately in the circuit court of the United States for the eastern district of Louisiana, before you, or some of you, in a cause between John G. Warner, complainant, and The City of New Orleans, respondent, wherein a decree was rendered on the 8th day of March, 1898, as follows, to wit:

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350. In Equity.

"The cause came on to be heard at this term upon the bill, amended bill, exhibits, answer, replication, proofs and testimony, and was argued by the solicitors for the respective parties and submitted, when the court took the same under consideration:

"Whereupon and on consideration thereof, and for reasons orally assigned, it is ordered, adjudged and decreed that there be judgment in favor of the defendant, The City of New Orleans, dismissing this suit with costs.

"(Signed) CHARLES PARLANGE, *Judge.*

"March 8, 1898."

as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the fifth circuit by virtue of an appeal sued out by said John G. Warner agreeably to the act of Congress in such case made and provided, fully and at large appears:

And whereas, in the present term of November, in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said United States circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be and the same is hereby reversed and this cause remanded to said circuit court with instructions to enter a decree as follows, to wit:

"1. It is decreed that the City of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 per cent. interest thereon from June 6th, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be, and the same are hereby declared to constitute a trust fund in the hands of

the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city, under authority of the act No. 16 of the legislature of the State of Louisiana, approved February 24, 1876.

3. That it be referred to one of the masters of the court to take and state an am-ount of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments, by any person having possession thereof, and to examine witnesses touching all such matters.

In taking and stating said account the master is directed to charge the defendant as well with the amount of drainage assessments against the city on the area of the streets, squares, and public places, as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice by advertisement in a newspaper published in the city of New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims.

And it is further ordered that said warrant-holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions, or to obtain special leave of the court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

5. It is further decreed that upon the coming in of the master's report and its confirmation, the complainant and all those who have established their claims under the fourth clause of this decree, will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then the proper *pro rata* thereof, and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interest have leave to apply to the court for such other and further orders as may be necessary, from time to time, to carry this decree into full effect, and that the defendant pay all costs of this suit.

It is further decreed that the defendant The City of New Orleans be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court."

May 17, 1898.

You, therefore, are hereby commanded that such further proceedings be had in said cause in accordance with the decree of this court and as according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the fifth day of December in the year of our Lord one thousand eight hundred and ninety-eight.

(Signed) J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Clerk's costs due $5.70.

(Endorsed:) No. 12350. United States circuit court of appeals for the fifth circuit. No. 691. November term, 1897. John G. Warner, appellant, *vs.* The City of New Orleans, appellee. Mandate filed Dec. 5, 1898. H. J. Carter, d'y clerk.

Motion and Order Making Parties.

Filed Jan. 16th, 1900.

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray, and Rouse & Grant, solicitors for Ann Warner, Joanna E. McCrossin, Mary E. Warner and Harry Warner, sole heirs-at-law of John G. Warner, deceased, complainant in the above entitled and numbered suit, and on suggesting to the court that said John G. Warner departed this life on the 21st day of March, 1899, that his succession has since been duly opened in the civil district court for the parish of Orleans and the movers herein have been duly recognized as his heirs-at-law and put in possession of his property in Louisiana, as will more fully appear from the duly certified copy of the decree of said court herewith presented and made part hereof:

It is ordered by this court that said Ann Warner, Joanna E. McCrossin, Mary E. Warner and Harry Warner be made parties plaintiff herein, and that this suit and all the proceedings herein stand revived in their names and be in the same plight and condition as the same stood at the time of the death of said John G. Warner.

No objection to the entry of the above.

(Signed) SAM'L L. GILMORE, *City Att'y.*
BRANCH K. MILLER,
Solicitor for Defendant.

Copy of Judgment of Civil District Court.

Filed Jan 16th, 1900.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I hereby certify that on the 27th day of December, 1899, judgment was rendered in this court in the following-entitled suit in the words and figures following, to wit:

Division "C."

Succession of JOHN G. WARNER. No. 61015.

Judgment.

On petition of widow and sole heirs to be recognized and put in possession.

The court being satisfied from the evidence adduced and the law applicable to the case, that the petitioners are entitled to the relief prayed for,

It is ordered, adjudged and decreed that Ann Warner, widow of John G. Warner, be and she is hereby recognized as the widow, and as such entitled to and put in possession in her own right of one-third ($\frac{1}{3}$) of all the personal property and movables left by said decedent.

It is further ordered, adjudged and decreed that Joanna E. McCrossin, Mary E. Warner and Harry Warner, be and they are hereby recognized as the sole heirs of John G. Warner, deceased, and as such entitled to and put in possession of the remaining two-thirds ($\frac{2}{3}$) of said property in equal proportions. All under the statute and jurisprudence of the State of New York.

Judgment rendered and signed in open court December 27th, 1899.

(Signed) JOHN ST. PAUL, *Judge.*

In testimony whereof I have hereunto set my name and affixed the seal of the said court, at the city of New Orleans, this 27th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] (Signed) F. E. PETERSON,
Deputy Clerk.

(Endorsed on back:) No. 61015. Civil district court. Succession of John G. Warner. Copy of judgment.

Motion to File and Record Mandate of the U. S. Supreme Court, &c.

Filed February 19th, 1900.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, JOANNA E. McCrossin, Mary E. Warner, and Harry Warner, Substituted,

vs.

THE CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard de Gray and Rouse & Grant solicitors for complainants, and on suggesting to the court that since the filing of the mandate of the United States circuit court of appeals for the fifth circuit herein, on the 5th day of December, 1898, and the entry

of the judgment and decree based thereon, under which the case was referred to A. G. Brice, Esq., master in chancery to examine and report pursuant to said decree, this cause was removed to the Supreme Court of the United States on writ of certiorari, where, after due proceedings, the decree of said United States circuit court of appeals was affirmed with costs, on the 15th day of January, 1900, as per the mandate of said Supreme Court now presented.

It is ordered that said mandate be now filed and that the decree of the Supreme Court therein contained in the words and figures following, be recorded, to wit:

"It is now hereby ordered, adjudged and decreed by this court that the decree of the said United States circuit court of appeals in this cause be, and the same is hereby, affirmed with costs; and that the said appellant, John G. Warner, recover against the said appellee for his costs herein expended and have execution therefor.

"And it is further ordered that this cause be, and the same is hereby remanded to the circuit court of the United States for the eastern district of Louisiana with a direction to comply with the decree of the circuit court of appeals."

And it is now ordered by this court that the master herein proceed forthwith with his accounting and report in accordance with the decree herein entered on said 5th day of December, 1898, pursuant to the decree of said United States circuit court of appeals, affirmed as aforesaid, with a direction to this honorable court to comply therewith.

Signed as of date February 19, 1900, *nunc pro tunc*.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Feb. 20, 1900.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

Mandate of Supreme Court of the United States.

Filed Feb. 19, 1900.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Louisiana, Greeting:

Whereas, lately in the United States circuit court of appeals for the fifth circuit, in a cause between John G. Warner, appellant, and The City of New Orleans, appellee, wherein the decree of the said circuit court of appeals, entered in said cause on the 7th day of May, A. D. 1898, is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel. On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be and the same is

hereby, reversed and this cause remanded to said circuit court with instructions to enter a decree as follows, to wit:

"1. It is decreed that the city of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 per cent. interest thereon from June 6, 1876, as stipulated in the warrants sued on and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares and other public places as well — those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of act No. 16 of the legislature of the State of Louisiana approved February 24, 1876.

3. That it be referred to one of the masters of the court to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments by any person having possession thereof and to examine witnesses touching all such matters.

In taking and stating said account the master is directed to charge the defendant as well with the amount of drainage assessment against the city on the areas of the streets, squares, and public places as with those against the owners of private property with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice, by advertisement in a newspaper published in the city of New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims.

And it is further ordered that said warrant-holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions or to obtain special leave of the court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

It is further decreed that upon the coming in of the master's report and its confirmation the complainant and all those who have established their claims under the fourth clause of this decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then for the proper *pro rata* thereof and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interest have leave to apply to the court for such other and further orders as may be necessary from time to time to carry this

decree into full effect, and that the defendant pay all costs of this suit.

It is further decreed that the defendant, The City of New Orleans be condemned to pay the costs of this cause in this court for which execution may be issued out of said circuit court," as by the inspection of the transcript of the record of the said United States circuit court of appeals, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said United States circuit court of appeals in this cause be, and the same is hereby affirmed with costs; and that the said appellant, John G. Warner, recover against the said appellee for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the circuit court of the United States for the eastern district of Louisiana with a direction to comply with the decree of the circuit court of appeals.

It is further ordered that this decree be entered *nunc pro tunc* as of March 13th, 1899.

January 15, 1900.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari, notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of February, in the year of our Lord one thousand nine hundred.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Endorsed on back: No. 12350. Supreme Court of the United States. No. 172, October term, 1899. The City of New Orleans *vs.* John G. Warner. Mandate.

Master's Report, Exceptions Thereto, and Master's Supplemental Report.

Filed March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Master's Report.

To the honorable the judges of the circuit court of the United States for the eastern district of Louisiana:

Pursuant to the decretal order of reference entered in the above-entitled cause by this honorable court on the 5th day of December, 1898, I respectfully report that the notice required to be made by said order was given to holders of all drainage warrants of the same class and kind as those held by the complainant, as set forth in his bill, by publishing the same in the Times-Democrat, a newspaper of general circulation, printed in the city of New Orleans, daily, for a period of thirty consecutive days, the first publication having been made on the 6th day of December, 1898, and the last on the 5th day of January, 1899.

In response to said notice, the following parties presented and filed with me on the 10th and 15th of December, 1898, and the 6th of January, 1899, claims on drainage warrants of the same date, *from* class and kind as those held by the complainant as follows:

1st.	John Crossley & Son, 58 warrants, aggregating.....	$149,000 00
2nd.	Wilder & Co., 2 warrants in judgment, aggregating	7,000 00
3rd.	F. J. Gasquet, 6 warrants, aggregating.....	30,000 00
4th.	The Suffolk Nat. Bank of Boston, 6 warrants, aggregating	60,000 00
5th.	Frank N. Butler and Mary E. Taliaferro, 1 warrant for.....	5,000 00
6th.	John J. Donaldson, 1 warrant for.....	2,000 00
7th.	Mrs. Eliza J. Lyttle, dative tutor, 3 warrants for..	12,000 00
8th	John G. Warner, complainant, 3 warrants, aggregating.....	6,000 00
9th.	James Jackson, 8 warrants, aggregating.....	45,000 00

The serial numbers of said warrants, and their dates and respective amounts are set forth in detail in the several claims in writing filed before me by said parties, which claims, together with the warrants held by them respectively are herewith returned into court, with this report, as part thereof.

The hearing of said reference was opened in my office in room No. 901 Hennen building, in the city of New Orleans, upon notice to all parties in interest, who attended by their respective counsel on the 10th, 15th and 16th of December, 1899, and on the 3d and

6th days of January, 1899, respectively, at 3 o'clock p. m., as will appear by reference to the procès verbal hereto annexed and marked Exhibit "A," which contains a record of all the proceedings had before me, and includes all the evidence taken and proofs submitted on the reference from the date the hearing was opened, until the 6th day of January, 1899, when further proceedings were suspended by the writ of certiorari removing the cause to the Supreme Court of the United States, for the purpose of a review of the decree, as well as the proceedings had and proofs taken since. Subsequently the decretal order of this court dated February 19th, 1900, directing me to proceed with the hearing under the original order, having been delivered to me, I gave notice to all parties in interest that I would proceed with the reference at my office on the 21st of February, 1900, at 3.30 p. m., at which hour the complainant and the claimants appeared by their counsel, Richard de Gray and Rouse & Grant, and the defendant by its counsel, Branch K. Miller, Esq. Here the claim of Frank N. Butler and Mary Taliaferro was amended and supplemented by admitting Mrs. Frank N. Butler as a claimant in her capacity of widow in community and testamentary executrix of the last will and testament of said Frank N. Butler, her lately deceased husband who had departed this life since the filing of said original claim, and her written appearance together with a certified copy of her letters testamentary are herewith transmitted to the court with this report.

Further evidence was also taken and introduced by the claimants and city touching the matters at issue, all of which is contained in said procès verbal as now supplemented and returned into court.

And here all parties in interest by their counsel having declared that they had no further proofs to submit, the hearing was closed and the case was fixed for argument, and was argued and finally submitted on the 27th day of February, 1900.

And now upon a final consideration of the evidence and the arguments of counsel, I respectfully report to the court my findings of fact and conclusions of law, as directed by said orders of reference.

First.

I find, from all the evidence, and particularly from the depositions of S. D. Moody and Robert Shortridge, contained in said procès verbal of the proceedings before me, that the several drainage warrants presented to me by the several claimants aforesaid, were each issued to Warner Van Norden, transferree of the Mexican Gulf Ship Canal Company, by the defendant, The City of New Orleans, in payment of the consideration of the agreement and contract of sale between himself and said city by act before Gustave Le Gardeur, notary public, dated June 7, 1876, as in said act specified, pursuant to the authority of the act of the legislature of Louisiana, No. 16, dated February 24, 1876, as set forth in the complainant's bill; that said warrants were all presented to the administrator of finance of the city of New Orleans on the day of the date of said warrants, for payment, and that the fact of their presentation was endorsed by

said administrator on each of said warrants, as appears from such endorsements thereon.

I further find that none of said warrants have been paid, either in whole or in part, and that by reason of said presentation the defendant has become liable to pay eight (8) per cent. interest per annum thereon from June 6, 1876, until the same are paid.

I further find that each of said warrants were endorsed in blank by Warner Van Norden, transferee, to whose order they were made payable, and delivered to the said claimants, or to other parties through whom they have acquired title; and that the said Van Norden has since, by a written agreement dated October 20th, 1894, which was filed in this cause as an exhibit to the bill and has been offered in evidence before me, formally transferred to the complainant and to all holders of warrants who might intervene in this cause any and all interests he ever had in said warrants, and subrogated them to all his rights of action and remedies against the defendant appertaining to the same. And the said claimants having made satisfactory proof of their claims, I find that they are entitled to be paid the principal and interest due on the warrants held by them respectively out of the drainage assessments and taxes established as a trust fund for their payment by the said decree of December 5, 1898, and that they are entitled in all respects to the same relief as the complainant is under said decree.

And I further find from the proofs submitted to me, that the claimant-, Wilder & Co., are entitled to be paid the sum of $215.35 for their costs in their suit at law against the City of New Orleans, wherein they recovered judgment on their warrants in the circuit court of the United States for the eastern district of Louisiana, with costs, as appears from said judgment and the clerk's taxation of costs filed with their claim.

Second.

I further find from the averments of the complainant's bill, confessed by the defendant in its answer, and from the exhibits annexed to said bill, and the evidence of Clark Steen, an expert accountant who has examined the drainage assessment-rolls, and the judgment thereon:

1st. That the drainage assessments against the defendant, The City of New Orleans, for drainage taxes on the area of streets, squares and other public places, ou-standing and unpaid, for which the defendant has been decreed to account, after deducting all credits claimed by it, to which it is entitled under the decree,

amounts in principal to	$691,612.73
In statutory interest computed, as per Schedule No. 1, to December 5th, 1898	1,106,852.84
In statutory interest from December 5, 1898, to March 5, 1900	51,870.95
Total	$1,850,336.52

2nd. That the drainage assessments against private persons and property in the several drainage districts of the city of New Orleans

outstanding and uncollected, for which the defendant is accountable, after deducting all credits claimed by defendant, to which it is entitled under the decree of reference, amounts in principal to..... $724,941.54

In statutory interest from March 21, 1874, to December 5, 1898..... 1,075,329.95

In statutory interest from December 5, 1898, to March 5, 1900..... 54,370.61

Total..... $1,854,642.10

To arrive at these figures as to the amount due the drainage fund, at the present request of counsel for the defendant as well as counsel for the complainant and the claimants, Mr. Clark Steen, an expert accountant, familiar with the records of the city, was accepted to assist me. As a result of his work, he submitted, before these proceedings were suspended by the writ of certiorari heretofore referred to, Schedules No. 1 and No. 2, which contain statements of the whole amount of drainage taxes assessed against the city and private persons, with a computation of the statutory interest due thereon up to December 5th, 1898. I have accepted his statements as the basis of these findings, adding, myself, the interest which has accrued since that date to the present time. I would state, in this connection that, by consent of all parties, interest has been computed on all the tax judgments for convenience from March 21, 1874, as a common date, although many of the judgments are of an earlier date, the complainant and warrant-holders being satisfied that the computation will produce a sufficient fund to satisfy their claims.

Third.

I further find that all the drainage warrants issued under the agreement and contract of sale dated June 7, 1876, except $4,000, have been presented and proved before me; and that if all had been presented and proved there would be due thereon, in principal and interest, the sum of $928,000.00; and I further find that the amount due by the city, whether for taxes assessed against it, or for those assessed against private persons, as stated in my 3d finding, is more than sufficient to pay said sum. As a conclusion of law, therefore, I find that the complainant and the several claimants and holders of drainage warrants, including James Jackson, if his claim is not barred by the decree in the Peake case, are entitled to absolute decrees against the defendant for the amounts due them with costs.

Fourth.

These findings apply to all the warrant-holders, including James Jackson, who will be entitled to the same relief as the complainant and others, unless he is barred of relief by the decree in the case of James W. Peake *vs.* The City of New Orleans, No. 11614 on the docket of this court, as to whose claim I shall make a separate and

special finding as to the effect of that decree, counsel for all parties having requested me to do so March 5, 1900.

(Signed) A. G. BRICE, *Master.*

Supplemental Report on Defendant's Exceptions.

The objection to the validity of $20,000 of the warrants proved before me was not suggested by the defendant at the hearing, but is now made for the first time in its exceptions to the foregoing report. It appears, and I so find, that the city issued warrants Nos. 313 to 392, inclusive, in discharge of the consideration of the agreement of sale passed before Le Gardeur, notary public, amounting to $300,000, and also issued warrants Nos. 392 to 402, inclusive, aggregating $20,000, not for work but as a compromise of drainage taxes collected and misappropriated, as stated in the said act. Of the latter Crossley and Son are the holders of warrants Nos. 393 to 397, inclusive, for $2,000 each, amounting to $10,000; Mrs. Lyttle is the holder of warrant No. 398 for $2,000; John J. Donaldson is the holder of warrant No. 402 for $2,000, which is included in their judgment. Warrants 400 and 401 for $2,000 each have not been presented or proved, and appear to have been paid.

As act of February 24, 1876, section 1, specially authorized the city to transact or compromise with the transferee of the Mexican Gulf Ship Canal Company for the purchase and settlement of "all or any rights, franchises and privileges created, authorized or arising in favor of said company, or said transferee, under and by virtue of act 30 of 1871; also for the purchase and transfer of all tools, implements, machines, boats and apparatus belonging to said company, or its transferees," &c., I have no doubt but that the city, by the first clause of said act, was given plenary power to compromise and settle any claim the company or its transferee, had against the city arising out of the execution of the work under the provisions of the act of 1871, including claims based on work warrants, or on account of the diversion of drainage taxes, for which they were in fact given.

The claim of Wilder and Co. is upon a different footing. It is based on a judgment at law recovered by them in this court on two warrants, one for $5,000—part of the $300,000 of warrants issued for the purchase price of the sale, and one, No. 402, for $2,000—part of the $20,000 of compromise warrants, which judgment is final, and constitutes *res judicata*. The liability of the defendant was expressly determined by the U. C. circuit court of appeals in Wilder *v.* City of New Orleans, 87 F. R., 843, and is no longer open to examination.

Another objection, not made before me at the hearing by the defendant, now set up as an exception to the report, is that the act of February 24, 1876, did not authorize the city to compromise or settle claims for damages due the transferee of the Mexican Gulf Ship Canal Company, and that all warrants issued in excess of $153,750, the appraised value of the drainage plant, are void. I think the

exception is clearly unfounded. The first section of that act quoted above authorized the city to transact and contract for the purchase and settlement of all or any rights arising in favor of the canal company, or its transferee, under the act of 1871, as well as to purchase the dredge-boats and other property of the company. The word "transact" means, in the jurisprudence of this State, and is equivalent to, the word "compromise" (C. C. 3071), and it may be assumed that it was used by the legislature in this sense. The statute was an express legislative mandate, authorizing the city to compromise all claims growing out of a particular transaction without any litigation whatever and to pay the amount agreed upon in warrants. A mandate from one private person to another in the same words would comply with the requirements of the Civil Code in the respect (C. C., 2997; 40 A., 234). It seems clear, therefore, that the statute conferred upon the city the fullest power to settle and pay all claims for damages, even if they were the sole consideration for the warrants. But the city was authorized to purchase the franchise of the canal Co. as well as to settle the claims for damages, and it does not appear what portion of the warrants, issued in excess of the value of the property purchased, was for the price of the franchise and what portion for damages. Indeed, it does not at all appear that any of them were issued for damages. This seems to have been the view taken by the Supreme Court in answer to the complaint of the city that the price paid was excessive, for Mr. Justice Brown notes the fact that the consideration of $300,000 in warrants was fixed upon to cover not only the value of the property and the plant, but the exclusive franchise of the company under the act of 1871, and the claim for damages, as to which the appraiser came to no conclusion and fixed no special amount. New Orleans *v.* Warner, 175 U. S., 120.

But I do not consider the validity of the contract under which these warrants were issued to be now open for contestation. As to this, the decree of the circuit court in favor of the complainant, affirmed by the Supreme Court, of which all claimants who have come in under it are entitled to the benefit, is conclusive on the defendant. The court necessarily found the contract to be valid, and the question cannot be again agitated.

The exception of the defendant as to the amount of taxes due by private persons, for which the defendant is found accountable, is, also, in my opinion, untenable. It is now too late to urge this objection, as I am directed by the decree of reference to charge the defendant in the accounting with all these taxes, which have not been collected and accounted for; and I am not at liberty to inquire whether the unpaid taxes of this class are collectible or not. The defendant is concluded, in this respect, by the decision of the supreme court and of the court of appeals which holds the defendant liable on the express ground that it has made itself liable therefore as a delinquent trustee.

For these reasons, I am constrained to overrule the defendant's exceptions to the report as first drafted, and I respectfully return into

court all the proceedings had before me and evidence adduced by the parties, together with the defendant's said exceptions.

Respectfully submitted.

March 7th, 1900.

(Signed) A. G. BRICE, *Master.*

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

To the report of the Honorable A. G. Brice, special master herein, defendant, The City of New Orleans, objects on the following grounds, to wit:

First. That there is error in charging defendant with liability for the whole of the uncollected assessments against private property owned by private persons, because the evidence shows that all such taxes as could be or were susceptible of collection have been collected and paid over to the parties and purposes for which they were assessed.

Second. That the advantages of the decree herein, under which this reference is made, extend to such warrants as were used in payment of the property purchased by the act before G. Legardeur, notary public, of date June 7th, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750.00, and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the circuit court of appeals and of the supreme court herein; that such balance of said warrants were issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company, and Warner Van Norden, against the city of New Orleans; that of said warrants, the sum of $20,000.00 were issued, as will appear by the express terms of the said act, in payment of work which had been done by the said Van Norden, that is, digging canals and building levees, which, at the time of the passage of the said act, had not been surveyed or measured by the city surveyor, and hence, that as to these warrants there could be no recovery or allowance made; that in any event, the decree in the suit of J. W. Peake *vs.* City of New Orleans, No. 11614 of the United States circuit court for the eastern district of Louisiana, is *res judicata* in favor of this defendant.

That although there is no mark or sign upon any of the said warrants, which were issued in payment of the price of the property purchased, and which were given in settlement of the claim for damages, and which were executed and delivered in payment for drainage work which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payments of the price of said property, and which were issued for the other two purposes named; that it must

be considered that the warrants were issued and applied in the numerical order of their execution, first for the payment of the price of the property purchased, next to the settlement of the claim for damages, and lastly to the payment for work mentioned in said notarial act; that all of said warrants bear date June 6th, 1876, the first one bearing the number 313, and run up to and inclusive of the number 402, as is shown by the statement of the said warrants contained in the record, as well as the warrants themselves, offered in evidence.

That from an examination of the said warrants, and a comparison of their numbers, it will be seen, that with the issuance of warrant No. 332 there had been reached an issue of $150,000.00, adding to which, warrant 333, for $5,000.00 would make a total issue of $155,000.00, of a difference of $1,250.00 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

Payment of all warrants subsequent to warrant No. 333 should be refused.

(Signed) SAM'L L. GILMORE, *City Att'y*,
B. K. MILLER,
Solicitor for Def'd't.

Testimony Before A. G. Brice, Esq., Master in Chancery, on Claims of Warrant-holders.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Testimony Before A. G. Brice, Esq., Master in Chancery, on Claims of Warrant-holders.

NEW ORLEANS, LA.,
SATURDAY, *December* 10, 1898—3 o'clock p. m.

This case came up before the master this day at this office in the Hennen building.

Present: Mr. Richard de Gray and Mr. William Grant, solicitors for complainant, and other warrant-holders; Mr. Branch K. Miller, counsel for the city of New Orleans.

By Mr. MILLER: By appearing here it is done with the full reservation of whatever rights the city may have growing out of the application for a certiorari in this case to be presented in the Supreme Court of the United States on the 19th instant, of which notice has been given and accepted. This appearance not to be considered or intended as a waiver of whatever right the city may have under the application.

To which counsel for complainant reply that they now proceed subject to whatever rights the city may have under the reservation just made.

Mr. S. D. Moody, called for complainant, sworn:

Examined by Mr. Grant—on the claim of John Crossley & Son:

Q. Mr. Moody, what was your business and occupation in 1876 and prior thereto?

A. I was secretary of the Mexican Gulf Ship Canal Company and superintendent of the drainage work for Warner Van Norden, transferee.

Q. Are you familiar with the signature of Warner Van Norden?

A. I am.

Q. Do you know the signature of J. G. Brown, administrator of public accounts at that time and of E. Pilsbury, administrator of finance?

A. Yes sir.

Q. Examine the fifty-eight warrants filed before master under the claim of John Crossley & Son, Limited, and state whether the signatures of the said administrator of finance and of the administrator of accounts, signed to those warrants, are their genuine signatures?

(Counsel hands witness warrants referred to which witness examines closely.)

A. I have examined the warrants and these are their genuine signatures.

Q. The signatures of Warner Van Norden, transferee, endorsed on the warrants, state whether it is his genuine signature or not?

A. It is. The signature on the warrant is J. G. Brown and the signature to the presentation for payment is Pilsbury.

By Mr. Grant: I offer the warrants of John Crossley & Son, Limited, in evidence (herewith marked "1" to "58" inclusive), said warrants being numbered and representing amounts as follows:

				Amount.	Master's No.
Drainage warrants	No.	330	for.....	$5,000 00	1
"	"	319	"	10,000 00	2
"	"	321	"	10,000 00	3
"	"	367	"	2,000 00	4
"	"	366	"	2,000 00	5
"	"	365	"	2,000 00	6
"	"	364	"	2,000 00	7
"	"	363	"	2,000 00	8
"	"	362	"	2,000 00	9
"	"	361	"	2,000 00	10
"	"	360	"	2,000 00	11
"	"	359	"	2,000 00	12
"	"	358	"	2,000 00	13
"	"	357	"	2,000 00	14
"	"	356	"	2,000 00	15
"	"	355	"	2,000 00	16
"	"	354	"	2,000 00	17

				Amount.	Master's No.
Drainage warrant	No.	353	for.....	$2,000 00	18
" "	"	352	"	2,000 00	19
" "	"	351	"	2,000 00	20
" "	"	350	"	2,000 00	21
" "	"	349	"	2,000 00	22
" "	"	348	"	2,000 00	23
" "	"	347	"	2,000 00	24
" "	"	346	"	2,000 00	25
" "	"	345	"	2,000 00	26
" "	"	343	"	2,000 00	27
" "	"	340	"	5,000 00	28
" "	"	339	"	5,000 00	29
" "	"	368	"	2,000 00	30
" "	"	369	"	2,000 00	31
" "	"	370	"	2,000 00	32
" "	"	371	"	2,000 00	33
" "	"	372	"	2,000 00	34
Drainage warrants	No.	373	for.....	2,000 00	35
" "	"	374	"	2,000 00	36
" "	"	375	"	2,000 00	37
" "	"	376	"	2,000 00	38
" "	"	377	"	2,000 00	39
" "	"	378	"	2,000 00	40
" "	"	382	"	2,000 00	41
" "	"	383	"	2,000 00	42
" "	"	384	"	2,000 00	43
" "	"	385	"	2,000 00	44
" "	"	386	"	2,000 00	45
" "	"	387	"	2,000 00	46
" "	"	388	"	2,000 00	47
" "	"	389	"	2,000 00	48
" "	"	390	"	2,000 00	49
" "	"	391	"	2,000 00	50
" "	"	392	"	2,000 00	51
" "	"	393	"	2,000 00	52
" "	"	394	"	2,000 00	53
" "	"	395	"	2,000 00	54
" "	"	396	"	2,000 00	55
" "	"	397	"	2,000 00	56
" "	"	320	"	10,000 00	57
" "	"	344	"	2,000 00	58

On the Claim of F. J. Gasquet.

Q. Examine the six warrants presented to the master on the claim of F. J. Gasquet and state whether the names attached to those warrants by the administrator of finance and the administrator of accounts are their genuine signatures?

(Counsel hands witness warrants referred to, which witness examines.)

A. They are genuine.

Q. Examine the endorsement of Warner Van Norden, transferee and state whether that is his genuine signature?

A. It is.

By Mr. GRANT: I offer in evidence the warrants of F. J. Gasquet (herewith marked "59" to "64" inclusive), said warrants being numbered and representing amounts as follows:

	Amount.	Master's No.
Drainage warrant No. 333 for.....	$5,000 00	59
" " " 334 "	5,000 00	60
" " " 335 "	5,000 00	61
" " " 336 "	5,000 00	62
" " " 337 "	5,000 00	63
" " " 338 "	5,000 00	64

On the Claim of Wilder & Co.

Q. Examine the two warrants filed by Wilder & Co., on their claim and state whether the signatures of the administrator of finance and administrator of accounts signed thereto are their genuine signatures.

(Counsel hands witness warrants referred to, which witness examines.)

A. I have examined them and they are their genuine signatures.

Q. Examine the signature of Warner Van Norden, transferee, endorsed on the back of these warrants and state whether that is his genuine signature.

A. It is.

By Mr. GRANT: I offer in evidence the warrants of Wilder & Co. (herewith marked "65" and "66" respectively), said warrants being numbered and representing amounts as follows:

	Amount.	Master's No.
Drainage warrant No. 341 for.....	$5,000 00	65
" " " 402 "	2,000 00	66

By Mr. DE GRAY: On the claim of Wilder & Co., we also offer the bill of costs of the clerk, the marshal and the clerk of the circuit court of appeals; also, the petition, answer and judgment at law in the case of Wilder & Co. *vs.* The City of New Orleans, being No. 11380 on the docket of the United States circuit court.

On the Claim of John J. Donaldson.

By Mr. GRANT:

Q. Mr. Moody, examine the warrant filed by John J. Donaldson on his claim and state whether the signatures of the administrator of finance and the administrator of accounts are their genuine signatures.

(Counsel hands witness warrant referred to which witness examines.)

A. I have examined the warrant and they are their genuine signatures.

Q. Examine the signature of Warner Van Norden, transferee, endorsed on the back of said warrant and state whether that is his genuine signature.

A. It is.

By Mr. GRANT: I offer in evidence the warrant of John J. Donaldson (herewith marked "67") said warrant being numbered and representing amount as follows:

	Amount.	Master's No.
Drainage warrants No. 399 for.....	$2,000.00	67

On the Claim of the Suffolk Bank.

By Mr. GRANT:

Q. Mr. Moody, examine the signatures of the administrator of accounts and the administrator of finance signed to the six warrants filed on the claim of the Suffolk national bank and state whether the signatures are the genuine signatures of those persons.

(Counsel hands witness warrants referred to which witness examines.)

A. They are.

Q. Examine the signature of Warner Van Norden, transferee, endorsed on the back of each of those warrants, and state whether the same are his genuine signatures or not.

A. They are.

By Mr. GRANT: I offer in evidence the six warrants of the Suffolk national bank (marked herewith "68" to "73" inclusive), said warrants being numbered and representing amounts as follows:

	Amount.	Master's No.
Drainage warrant No. 313 for.....	$10,000 00	68
" " " 314 "	10,000 00	69
" " " 315 "	10,000 00	70
" " " 316 "	10,000 00	71
" " " 317 "	10,000 00	72
" " " 318 "	10,000 00	73

On the Claim of John G. Warner.

By Mr. GRANT:

Q. Mr. Moody, examine the signatures of the administrator of accounts and administrator of finance, signed to the three warrants filed on the claim of John G. Warner, and state whether the signatures signed thereto are genuine.

(Counsel hands witness warrants referred to which witness examines.)

A. I have examined and they are their genuine signatures.

Q. Examine the endorsements of Warner Van Norden, transferee, on the back of such warrants and state whether the same are his genuine signatures.

A. They are.

By Mr. GRANT: I offer in evidence the three warrants of John G. Warner (marked herewith "74" to "76" inclusive), said warrants being numbered and representing amounts as follows:

	Amount.	Master's No.
Drainage warrant No. 381 for.....	$2,000 00	74
" " " 380 "	2,000 00	75
" " " 379 "	2,000 00	76

On the Claim of F. N. Butler and Mrs. M. E. Taliaferro.

By Mr. GRANT:

Q. Examine the warrant filed in this case on the claim of F. N. Butler and Mrs. M. E. Taliaferro and state whether the signatures of the administrator of finance and administrator of accounts signed to said warrants are their genuine signatures. (Counsel hands warrant referred to — witness, which witness examines.)

A. They are.

Q. Examine the endorsement of Warner Van Norden, transferee, on the back of said warrant, and state whether the same is his genuine signature.

A. It is.

By Mr. GRANT: I offer in evidence the warrant of F. N. Butler and Mrs. M. E. Taliaferro (marked herewith "77"), said warrant being numbered and representing amount as follows:

	Amount.	Master's No.
Drainage warrant No. 342 for.....	$5,000.00	77

And I offer in evidence the certificate of the administrator of finance endorsed on each of the warrants presented by the foregoing claimants that said warrants were presented for payment June 6, 1876.

Q. Mr. Moody, do you know for what consideration and purpose these warrants were issued?

A. For the purchase of dredge-boats, material and contract; the franchises, rights and privileges of the Mexican Gulf Ship Canal Co., and Warner Van Norden, transferee, all signed.

By Mr. GRANT:

Q. They (the city) bought them out and made a complete settlement with them with those warrants?

A. Yes.

By Mr. GRANT:

Q. To whom were the warrants delivered when the act of sale was passed?

A. Well, the president and secretary of the company signed and Mr. Van Norden signed and the warrants were delivered to Mr. Van Norden.

Q. Do you know whether they were presented to the administrator of finance and the administrator of accounts?

A. We know they were and they show it on their face.

Q. Were you present at the time of the sale?

A. I was present and signed the act of sale as secretary of the Mexican Gulf and Ship Canal Company.

Q. You were familiar with the entire transaction?

A. I was.

By Mr. DE GRAY:

Q. How long had you known Mr. Van Norden, Mr. Moody, for several years prior to this transaction?

A. I have known Mr. Van Norden since '62, very intimate with him.

Q. And have seen him write very, very often?

A. Hundreds of times.

Q. And how were you acquainted with the people who signed the warrants, the two administrators, Brown and Pilsbury?

A. While the work was going on I went to them every month and — warrants for the work.

Q. And you saw them sign them very, very frequently?

A. Yes.

Q. And that is the way you became familiar with their signatures?

A. Yes.

Q. Mr. Moody, as I understand from your evidence, then, these warrants, concerning which you have testified and which you have examined, were a part of the warrants that were given for the purchase—were delivered under the bill of sale for the purchase that was made by the city of the Mexican Gulf Ship Canal Company and Warner Van Norden, transferee? They were drawn by the city for the purpose of paying for that property?

A. Yes.

Q. Mr. Moody, upon the delivery of these warrants that are specified in the act of sale that was executed before Le Gardeur, notary, what then became of the property that was referred to in that bill of sale, who took possession?

A. The city.

Q. And who delivered it?

A. Van Norden and the canal company—well, Van Norden and the canal company abandoned it to the city.

Q. You mean they delivered it after they had got the warrants, and they kept the warrants?

A. Yes, Van Norden and the canal company had had no more to do with it since.

By Mr. GRANT: On behalf of the complainant or others who have come in or may hereafter come in to get the benefit of the decree in

this case and the proceedings, we offer in evidence the record in this case, to wit, in the case of John G. Warner *vs.* The City of New Orleans, No. 12350, with all exhibits attached to the complainant's bill therein, together with all proofs by him offered, as detailed in his note of evidence filed in the circuit court on the 17th day of January, 1898, at the hearing. Also, the decree of the circuit court in the same cause dated the 5th of December, 1898, and all agreements of counsel contained in said record.

By Mr. DE GRAY: Complainant now offers the printed page 610 taken from the case of Peake *vs.* The City of New Orleans, headed "Recapitulation of assessments and amounts collected."

By Mr. GRANT: Mr. Robert C. Shortridge, a witness called by complainant, being present and offered as a witness, counsel for defendant waived his examination and agreeing that he would testify to the same effect as S. D. Moody who has been examined and would fully corroborate Mr. Moody's evidence.

Continued to Tuesday, December 13, 1898, at 3 o'clock p. m.

NEW ORLEANS, LA.,
TUESDAY, *December* 13, 1898—3.30 o'clock.

Pursuant to adjournment this case was called for hearing this day before the master.

Present: Mr. Richard De Gray and Mr. William Grant, counsel for complainant and other warrant-holders; Mr. J. J. McLoughlin, ass't city attorney, representing the city of New Orleans.

By consent the case was continued until tomorrow, December 14, 1898, 3.30 p. m.

NEW ORLEANS, LA.,
WEDNESDAY, *December* 14, 1898—3.30 p. m.

Pursuant to adjournment, this case called up this day before the master.

Present: Mr. Richard De Gray and Mr. William Grant, solicitors for complainant and other warrant-holders; Mr. Branch K. Miller and Mr. J. J. McLoughlin, ass't city attorney representing the city of New Orleans.

By Mr. MILLER: By appearing here it is done with the full reservation of whatever rights the city may have growing out of the application for a certiorari in this case to be presented in the Supreme Court of the United States on the 19th instant, of which notice has been given and accepted. This appearance not to be considered or intended as a waiver of whatever rights the city may have under that application.

By Mr. GRANT: I offer in evidence on the claim of Frank X. Butler and Mrs. E. M. Taliaferro decree of the civil district court, parish of Orleans in the succession of Geo. S. Lacey, No. 6530, to show that Mrs. Taliaferro was sole surviving heir of Geo. S. Lacey.

Continued to Thursday, Dec. 15, 1898, 3.30 p. m.

NEW ORLEANS, LA.,
THURSDAY, *December* 15, 1898—4 p. m.

This case was called up before the master this day pursuant to adjournment.

Present: Mr. Richard de Gray and Mr. William Grant, solicitors for complainant and other warrant-holders, Mr. Thomas J. Semmes, solicitor for Mr. James Jackson, warrant-holder; and Mr. J. J. McLoughlin, ass't city attorney and Mr. Branch K. Miller, counsel for the city of New Orleans.

By Mr. SEMMES: The signatures to the eight warrants owned by James Jackson filed herein and described in the claim, being

	Amount.	Master's No.
Drainage warrant No. 322 for.....	$10,000 00	78
" " " 323 "	5,000 00	79
" " " 324 "	5,000 00	80
" " " 325 "	5,000 00	81
" " " 326 "	5,000 00	82
" " " 327 "	5,000 00	83
" " " 328 "	5,000 00	84
" " " "	5,000 00	85

all dated June 6, 1876, all proof of signatures to which are waived by Mr. Miller, counsel for the city; including the endorsements on the back of the warrants; and the same are admitted to be genuine.

I offer in evidence the judgment of James Jackson against The City of New Orleans, number 11558, referred to in his claim, and also the record of the suit of James Jackson against The City of New Orleans and Jules Fontaine, receiver, No. 12660, in the circuit court of the United States, eastern district of Louisiana.

Continued to Friday, December 16th, 1898, 2 p. m.

NEW ORLEANS, LA.,
FRIDAY, *December* 16, 1898—2 o'clock p. m.

Pursuant to adjournment, this case was called up for hearing this day before the master.

Present: Mr. Richard de Gray and Mr. William Grant, solicitors for complainant.

Mr. CLARK STEEN, called for complainant, sworn.

Examined by Mr. GRANT:

Q. Mr. Steen, have you made a computation showing the amount of drainage assessments against the city as assessee of streets, squares and public places?

A. Yes, sir; from the transcript in this case of J. G. Warner *vs.* The City of New Orleans.

Q. Have you made a schedule of your computation?

A. Yes, sir.

Q. Will you produce it to the master?

A. This is Schedule 1, assessment of drainage taxes.

Q. What is the sum total you make it?

A. The sum total of assessments and interest calculated from the dates as appears in the schedule amounts to $1,798,465.57.

Q. Have you taken the dates for the beginning of interest from the judgment homologating the rolls?

A. Yes.

Q. And the computation is up to December 5, 1898?

A. The schedule shows the dates from which the interest was calculated to the date of the last judgment.

Q. Have you made a computation of the amount of taxes assessed against private person- and property in the city of New Orleans?

A. Yes, sir. In getting the assessment upon private property, I also went into the record of the Peake case No. 11614 of the United States circuit court and from there got the original assessment, deducted the amount of assessment on asylums, &c., and the amount collected by the commissioners, and also deducted the amount of assessment on city property, streets, &c., and then took that balance as the amount of assessment on private property turned over to the city authorities in each of the several districts.

Q. You have made a schedule showing your computation have you?

A. Yes.

Q. Will you hand it to the master? State whether you have had experience so as to render you competent to make these computations correctly?

A. Well, I have been employed in the city hall for some time and am a little familiar with the accounts, but I must say all these figures were taken from those records No. 336 and the records in the Peake case just mentioned. My figures that appear in the schedule I refer at all times to where I got them.

Q. And you got your figures from the copies of the original rolls?

A. From the records of the Peake case and from the case of Warner which purport to be copies of the original rolls. I checked the record in the Warner case with the record in the Peake case.

Q. Can you state whether your computations are correct or not?

A. I believe they are. I find a total assessment on private property of $1,008,034.41; I have deducted from that $1,000,000 the amount collected by the city of New Orleans to October, 1888 as appears in the recapitulation, pages 320 and 321 of the transcript in the Warner case, amounting to $273,401; also collections from October 1888 to June 20, 1891, which appears on page 344 of said transcript; also collections by Gurley, receiver, which appears on page 214 of transcript; collections by Gasquet, receiver, which appears on page 214 of the transcript; collections by Fontaine, receiver, which appears on page 488 of transcript, and the sum total of all the collections amount to $283,092.87, leaving a balance due of $724,941.54.

At the suggestion of counsel for the complainant the interest on this balance was computed from March 21, 1874, the date of the last

judgment of homologation to December 5th, 1898, at the rate of six per cent. per annum, making $1,075,329.95 added to the balance makes a grand total of $1,800,271.48.

By Mr. GRANT: The complainant is satisfied with the correctness of these computations and offers in evidence the computation sheets marked respectively Schedule- "1" and "2."

Adjourned without day.

NEW ORLEANS, LA.,
TUESDAY, *January 3d*, 1899—3.30 p. m.

This case was again called for hearing this day, before the master at his office-rooms 901–'3 Hennen building.

Present: Messrs. Richard de Gray and William Grant, solicitors for complainant and other warrant-holders; Mr. Thomas J. Semmes, solicitor for James Jackson, warrant-holder; Mr. W. R. Summerville, ass't city attorney.

By Mr. SUMMERVILLE: On behalf of the city of New Orleans, I desire to offer in evidence (1st) the bill, answer and decree of the record in J. W. Peake *vs.* City of New Orleans, No. 11614, United States circuit court, eastern district of Louisiana, found on pages 142, 160 and 359 respectively of the record of the Supreme Court in the case entitled City of New Orleans, appellant, *vs.* John G. Warner, appellee; (2nd) the intervening bill of James Jackson in the same case, found on page 358 of the same record; and (3d) the petition, answer and judgment at law in James Jackson *vs.* City of New Orleans, in suit No. 11558, United States circuit court, eastern district of Louisiana, found on pages 360, 361, 362, 363 respectively of the same record.

By Mr. SEMMES: I offer in evidence the opinion and decree of the Supreme Court of the United States in Peake *vs.* City of New Orleans as found in 139 U. S., 343, 361, inclusive, and it is agreed that the opinion and decree may be read from the printed volume instead of offering a written copy.

Adjourned.

NEW ORLEANS, LA.,
FRIDAY, *January* 6, 1899—3.30 p. m.

This case was called before the master this day for further evidence.

Present: Messrs. Richard De Gray and William Grant, solicitors for complainant and other warrant-holders; Messrs. Saunders & Miller, for certain warrant-holders; Mr. Thomas J. Semmes, solicitor for James Jackson, warrant-holder, and Mr. Branch K. Miller, attorney for the City of New Orleans.

Mr. S. D. MOODY, recalled, examined on the claim of Eliza J. Lyttle, dative tutrix, on her intervention.

By Mr. GRANT:

Q. Please examine the three drainage warrants now handed you, all dated June 6, 1876, and numbered as follows:

	Amount.	Master's No.
Drainage warrant No. 331, for.....	$5,000 00	
" " 332, "	5,000 00	
" " 398, "	2,000 00	

Signed by J. G. Brown, administrator of accounts, and E. Pillsbury, administrator of finance, payable to the order of Warner Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, and each endorsed Warner Van Norden, transferee, and state whether you recognize the same.

A. I have examined said drainage warrants and recognize them as part of the drainage warrants delivered by the city of New Orleans to Warner Van Norden under the bill of sale from the Mississippi & Mexican Gulf Ship Canal Company and Warner Van Norden, transferee, to the city of New Orleans, passed before G. L. Gardner, notary public, dated June 7, 1876.

Q. Please state in whose handwriting the same are.

A. Said endorsements on each of said warrants are in the genuine handwriting of Warner Van Norden, with which I am very familiar, having seen him write very often and with whose signature I am very familiar.

Q. Examine the signature to each of said warrants, of J. G. Brown, administrator of accounts, and E. Pillsbury, administrator of finance, and, if you know, state whose signatures those are.

A. I have examined said signatures. They are the genuine signatures of said J. G. Brown, at the time administrator of accounts, and E. Pillsbury, at the time administrator of finance; I am familiar with the signatures of both parties, have done much business with them at the city hall in their respective capacities. In fact, all of the warrants delivered under the before-mentioned act of sale, including those I have just examined, were delivered, after having been presented for payment to said administrator of finance, to Warner Van Norden, transferee of said Mississippi & Mexican Gulf Ship Canal Company, in my presence.

Counsel for intervenor offers in evidence the warrants dated and numbered as above.

Adjourned.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, JOANNA E. McCrossin, Mary E. Warner, and Harry Warner, Substituted,
vs.
CITY OF NEW ORLEANS.
No. 12350.

Testimony before A. G. Brice, Esq., Master in Chancery.

NEW ORLEANS, LA.,
WEDNESDAY, *February* 21, 1900—3.30 p. m.

This case is resumed under the order of the United States circuit court of date February 19, 1900, and hearing was had this day before the master, A. G. Brice, Esq., at his office, No. 903 Hennen building.

Present: Mr. Richard De Gray and Mr. William Grant, representing warrant-holders; Mr. Branch K. Miller, for the City of New Orleans, and representing Mr. S. L. Gilmore, city attorney, excused.

Mr. JAMES JACKSON, warrant-holder, being sworn, testifies as follows:

Examined by Mr. GRANT, who with Mr. De Gray now appear for Mr. Jackson as successors to Mr. Thomas J. Semmes, representing the claim of Mr. Jackson filed in this suit:

Q. Mr. Jackson, are you the Mr. James Jackson, who appears in the record of James W. Peake *vs.* The City of New Orleans, No. 12008, as an intervenor?

A. Yes, sir.

Q. Did you ever see the intervention before it was filed by Mr. Semmes?

A. Never.

By Mr. MILLER: I object to that on the ground that the acts of Mr. Semmes filed in the intervention cannot be questioned in manner and form as now attempted.

By Mr. GRANT:

Q. Prior to the filing of that intervention did you at any time authorize or direct Mr. Semmes to state that the warrants held by you were given for work?

A. Those—they were purchase warrants.

Q. You never authorized Mr. Semmes to state in the intervention that they were given for work?

A. Never.

Q. Did Mr. Semmes ever inform you that he would state in this intervention that your warrants were given for work?

A. No, sir.

Q. Did you have any knowledge of the contents of the intervention before it was filed or afterwards?

A. Never.

Q. Of course, you were never sworn to the intervention?

A. Never did.

Cross-examination by Mr. MILLER:

Q. You knew, Mr. Jackson, Mr. Semmes had filed an intervention in the Peake case for you?

A. Not until after it was done.

Q. How long after it was done?

A. I don't recollect.

Q. You mean after the filing of the intervention?

A. Yes.

Q. Did you know of the intervention being filed prior to the decree of the circuit court in that case?

A. No, sir; I did not.

Q. You knew at the time the case was tried in the circuit court if Mr. Semmes was representing you in some way or other? He had your authority to do or to take any proceedings he thought proper to collect for you?

A. As far as verbal authority was concerned.

Q. The authority was not in writing?

A. No.

Q. But it was authority to do what he thought proper?

A. To collect the money, if possible. He had so much retaining fee and so much for money collected.

Q. You left it to his judgment what would be the proper judicial proceedings to effect your purpose?

A. Yes, sir; as a lawyer.

Q. The warrants that you held were purchase warrants?

A. Yes.

Q. Those you gave Mr. Semmes to collect?

A. Yes, sir.

Q. The same kind of warrants as those held by Mr. Warner, the plaintiff in this case?

A. Yes, sir.

By Mr. GRANT: It is admitted that Mr. Frank N. Butler is dead; that the warrant filed with the claim of Frank N. Butler and Mary E. Taliaferro was originally the property of Lacey & Butler, and that Mrs. Taliaferro is entitled to such portion as was bequeathed to her by George S. Lacey, to wit, two-thirds interest therein, and Mrs. Frank N. Butler is entitled to the other third therein in her own right as surviving widow in community and in her capacity as executrix. It is agreed that the signatures of the various witnesses for both sides to their depositions be dispensed with.

By Mr. DEGRAY: We reoffer the evidence heretofore taken before the master on this reference.

By Mr. MILLER: It is understood that the evidence offered by the defendant, set out in the statement thereof, here tendered in evidence (filed herewith and marked Exhibit "A") shall be read and used from the record of this case described in said memorandum to be taken and construed the same as if each piece of evidence was separately offered.

Mr. JUSTE FONTAINE, JR., called for defendant, being sworn, testified as follows:

Examined by Mr. MILLER:

Q. You are the present receiver of the drainage taxes?

A. Yes, sir.

Q. Appointed by the United States circuit court for the eastern district of Louisiana?

A. Yes, sir.

Q. In the case of James W. Peake *vs.* The City of New Orleans, No. 12008?

A. Yes, sir.

Q. You have been examined heretofore in this case?

A. Yes, sir.

Q. Are you still acting as receiver?

A. Yes, sir.

Q. Since your examination in this case formerly, before the reference to the master, have you made any collections of drainage taxes as receiver?

A. Yes, sir.

Q. How much?

A. February 24, 1899, $2.50; November 27, 1899, $1.50; November 24, 1899, $4.50; December 7, 1899, $4.50; December 7, 1899, $1.00; for 1900, January 12, $4.50; January 15, $8.00; total, $26.00.

Q. Mr. Fontaine, have you used due diligence and effort to collect all that could be reasonably collected from these taxes?

A. I have, sir.

Q. Do you think any more can be collected than you have already?

A. I know that more could not have been collected; these collections were from notaries who are my personal friends; that was the only reason advanced for which they were willing to pay the taxes; those who were not my personal friends, lawyers and notaries, refused to pay.

Q. Could you have collected any more by coercion or process of law?

A. No, I have filed two suits in the second city court and had an adverse decision each time; and two suits in the civil district court for small amounts, decided the same way.

Q. Do you think any more of those drainage taxes can be made collectible?

A. Do you mean by process of law?

Q. Yes.

A. You are asking me a question that involves a legal opinion. I say, yes, sir; I think so.

Q. The decisions have been against you?

A. In the civil district court and in the city court, as I stated before, but believe in the United States courts that we certainly ought to be able, in my opinion, to collect the taxes.

Q. Have you made any effort in that direction?

A. I have not; I am now under instructions from Mr. Louque to prepare a list of all the assessments for drainage taxes due and

unpaid in the city of New Orleans, and when we get them in a bulk, our intention is to make one large suit.

Q. You have that project on hand?

A. Yes, sir.

Q. Mr. Louque is your attorney?

A. Yes, sir.

Q. Aside from the legal questions?

A. It is impossible to collect.

Q. What is you- idea of what will be realized if you sell the property, if you should be allowed to do that?

A. You mean by the property, the property in the hands of the receiver?

Q. The property subject to the drainage taxes.

A. You mean outside of the legal aspect of the case?

Q. Yes.

A. I should say $300,000.

Q. Do you think that much could be collected?

A. Yes.

Q. That depends upon the result of this contemplated suit?

A. Certainly.

Q. You mean there is enough behind the taxes to realize that?

A. Yes, low estimate.

Q. You have gone over that subject?

A. Yes, sir.

Q. You propose doing that if it can be done?

A. Yes, sir.

Q. And that assumes you pass by all the difficulties heretofore encountered in the collection of those taxes?

A. Yes, sir.

Cross-examined by Mr. GRANT:

Q. Are you a lawyer?

A. Yes, sir.

Q. On what grounds do you expect to recover drainage taxes now against private persons?

A. That is a question I had rather not answer.

Q. You have been answering other questions, have been giving your opinion so far, let me ask?

A. To be frank with you, I take the opinion of Mr. Louque; he says it can be done, and I take his word for it.

Q. This is his opinion. Have you any reasons of your own?

A. Reasons of my own outside of his, no sir.

Q. So that your opinion is Mr. Louque's opinion?

A. Exactly.

Q. And you don't know what Louque's opinion is?

A. I do not know.

Q. Mr. Louque is your attorney?

A. Yes, sir.

By Mr. MILLER:

Q. How long have you been receiver?

A. The 19th of March, 1900, will be three years.
Q. You succeeded Mr. Gasquet, did you not?
A. Yes, sir.

By Mr. DE GRAY:

Q. That is the sum total of collections without reference to any indebtedness for expenses?
A. The expenses have been very light, I think $12 printing of releases.
Q. Expenses $12, and then up to this date you have not yet made any charge for your own services?
A. No, sir; that does not include the charge.

By Mr. MILLER:

Q. These possible collections, they refer only to the assessments against private persons, the $300,000 which Mr. Louque thinks will be realized?
A. Yes, sir.
Q. Out of the assessment against private property not on the streets and public squares of the city?
A. No, that is not included.

Defendants offer evidence as detailed in document filed with the master, February 26, 1900, and marked herewith Exhibit "X."
Complainants offer evidence as detailed in document marked Exhibit "Y," filed with the master, February 26, 1900.

The foregoing is a full and complete record of all proceedings had before me and evidence adduced by the respective parties on the hearing of reference in this cause, and the same are now certified to the court as part of my report.

(Signed) A. G. BRICE, *Master.*

March 7, 1900.

Claims of Various Persons Filed Before Master.

Claim of Frank N. Butler *et al.*, filed with warrants marked 77, before master Dec. 10, 1898, and filed in court with master's report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now came Frank N. Butler and Mrs. Widow M. E. Taliaferro, and accepting the benefit of the proceedings in the above-entitled cause and of the final decree entered therein on the 5th day of December, 1898, present and file with the master the following warrant

owned by them which is of the same character as those sued on by complainant, dated June 6, 1876, viz:

Warrant No. 342 for the sum of $5,000.00.

Claimant Frank N. Butler is owner of a one-third interest in said warrant as a member of the late firm of Lacy & Butler; and claimant Mrs. Widow M. E. Taliaferro is owner of the other two-thirds as universal legatee of Geo. S. Lacy, under his will probated in the civil district court for the parish of Orleans under the number 6530, August 4, 1882.

And they pray that their rights as holders of said warrant and creditor of the city of New Orleans may be established in this proceeding; and that the amount due on said warrant, including 8 per cent. interest per annum from June 6, 1876, date of presentation of same for payment, may be found and certified to the court for payment out of the trust fund created by said decree; and they pray for all such general relief as the master and the court are competent to give and for costs.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Sol's for Claimant.

Appearance of Mrs. Frank N. Butler, Executrix, and Letters Testamentary.

Filed February 21, 1900, before master, and filed in court with report of master March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now comes Mrs. Frank N. Butler, in her individual capacity as widow in community, and as executrix of the last will and testament of Frank N. Butler, her deceased husband, and makes herself a party to the claim heretofore filed before the master, in the name of her said late husband, and Mary E. Taliaferro, and she prays that she be substituted in his place, and be permitted to prosecute said claim in her said capacities.

Appearer files herewith a certified copy of the letters testamentary to her in the succession of her said deceased husband, No. 61179, civil district court for the parish of Orleans, dated January —, 1900.

(Signed) R. DE GRAY,
ROUSE & GRANT, *Solicitors.*

Let Mrs. F. N. Butler in her capacity as executrix of the estate of her late husband be authorized te represent said estate and sub-

stituted in the place and stead of her late husband as also in her own right. 2, 21, 1900.

(Signed) A. G. BRICE, *Master.*

Filed this 21st day of February, 1900.

THE STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division E.

To all to whom these presents may come, Greeting:

Whereas Mrs. Frank N. Butler named and appointed testamentary executrix of the last will and testament of the late Frank N. Butler, deceased, has applied to the civil district court for the parish of Orleans by petition, praying said court to grant letters testamentary therein:

Now know ye, that the said Mrs. Frank N. Butler is hereby authorized and empowered to collect all the goods and effects which were of said Frank N. Butler, deceased, and to make a just inventory thereof, and all other lawful acts to do and perform as testamentary executrix of the said last will and testament,

Witness our hand and the seal of said court, at the city of New Orleans this — day of January, in the year of our Lord one thousand nine hundred and the 124th of the Independence of the United States of America.

[SEAL.] (Signed) GEO. H. THEARD, *Judge.*
(Signed) F. E. PETERSON, *Dy Clk.*

A true copy.
(Signed) F. E. PETERSON.

(Endorsed:) No. 61179. Civil district court for the parish of Orleans. Succession of Frank N. Butler. Letters testamentary.

Claim of F. J. Gasquet.

Filed with warrants marked 59 to 64, incl., before master, December 10, 1898, and filed in court with report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now comes F. J. Gasquet, and accepting the benefit of the proceedings in the above-entitled cause and of the final decree entered therein on the 5th day of December, 1898, presents and files with the master the following drainage warrants dated June 6, 1876,

owned by him which are of the same class and character as those sued on by complainant, viz:

Drainage warrant	No.	333	for		$5,000.00
"	"	334	for		5,000.00
"	"	335	for		5,000.00
"	"	336	for		5,000.00
"	"	337	for		5,000.00
"	"	338	for		5,000.00
					$30,000.00

And he prays that his rights as holder of said warrants and a creditor of the city of New Orleans, may be established in this proceeding; and that the amount of said warrants with 8 per cent. interest thereon per annum from June 6, 1876, the date when said warrants were presented for payment, may be passed and certified to the court for payment out of the trust fund established by said decree; and he prays for all general relief in the premises such as the master and the court *is* competent to give under said decree and for costs.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Solicitors for Claimant.

Claim of John Crossly & Son, Ltd.

Filed with warrants marked "1" to "58," incl., before master, December 10, 1898, and filed in court with report March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now comes John Crossly & Son, Limited, a body corporate under the laws of Great Britain, and accepting the benefit of the proceedings in the above-entitled cause, and of the final decree rendered therein December 5, 1898, presents and files with the master the following drainage warrants owned by it, dated June 6, 1876, which are of the same character as those sued on by the complainant, viz:

Drainage warrant	No.	330	for		$5,000.00
"	"	319	"		10,000.00
"	"	321	"		10,000.00
"	"	367	"		2,000.00
"	"	366	"		2,000.00
"	"	365	"		2,000.00
"	"	364	"		2,000.00
"	"	363	"		2,000.00
"	"	362	"		2,000.00

Drainage warrant	No.	361	for	.....	2,000.00
"	"	360	"	.....	2,000.00
"	"	359	"	.....	2,000.00
"	"	358	"	.....	2,000.00
Drainage warrant	No.	357	for	.....	2,000.00
"	"	356	"	.....	2,000.00
"	"	355	"	.....	2,000.00
"	"	354	"	.....	2,000.00
"	"	353	"	.....	2,000.00
"	"	352	"	.....	2,000.00
"	"	351	"	.....	2,000.00
"	"	350	"	.....	2,000.00
"	"	349	"	.....	2,000.00
"	"	348	"	.....	2,000.00
"	"	347	"	.....	2,000.00
"	"	346	"	.....	2,000.00
"	"	345	"	.....	2,000.00
"	"	343	"	.....	2,000.00
"	"	340	"	.....	5,000.00
"	"	339	"	.....	5,000.00
"	"	368	"	.....	2,000.00
"	"	369	"	.....	2,000.00
"	"	370	"	.....	2,000.00
"	"	371	"	.....	2,000.00
"	"	372	"	.....	2,000.00
"	"	373	"	.....	2,000.00
"	"	374	"	.....	2,000.00
"	"	375	"	.....	2,000.00
"	"	376	"	.....	2,000.00
"	"	377	"	.....	2,000.00
"	"	378	"	.....	2,000.00
"	"	382	"	.....	2,000.00
"	"	383	"	.....	2,000.00
"	"	384	"	.....	2,000.00
"	"	385	"	.....	2,000.00
"	"	386	"	.....	2,000.00
"	"	387	"	.....	2,000.00
"	"	388	"	.....	2,000.00
"	"	389	"	.....	2,000.00
"	"	390	"	.....	2,000.00
"	"	391	"	.....	2,000.00
"	"	392	"	.....	2,000.00
"	"	393	"	.....	2,000.00
"	"	394	"	.....	2,000.00
"	"	395	"	.....	2,000.00
"	"	396	"	.....	2,000.00
"	"	397	"	.....	2,000.00
"	"	320	"	.....	10,000.00
"	"	344	"	.....	2,000.00
					$149,000.00

And the said John Crossly & Son, Limited, prays that its rights as holders of said warrants and creditor of the defendant may be established in this proceeding; and that the amount due on said warrants including eight per cent. interest thereon per annum from June 6, 1876, the date when the same were presented for payment, may be found and certified to the court to be paid out of the trust fund created by said decree; and it prays for all such further relief as the master and the court is competent to give, and for costs.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Sols. for Claimant.

Claim of Wilder & Company.

Filed with warrants marked 65 to 66, incl., before master, December 10, 1898, and filed in court with report March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now come C. T. Wilder and A. H. Wilder, composing the commercial firm of Wilder & Co., and accepting the benefit of the proceedings and of the final decree in the above-entitled cause entered on the 5th day of December, 1898, present and file with the master the following drainage warrants issued by the city of New Orleans, dated June 6, 1876, payable to Warner Van Norden, transferee, and by him endorsed, the same being of the character and class of warrants sued on in said cause by the complainant, viz:

One drainage warrant No. 341 for.....	$5,000.00
" " " " 402 "	2,000.00

Judgment on said warrants was rendered in favor of said Wilder & Co. against the City of New Orleans by the circuit court of the United States for this district, No. 11380 of the docket, on the 24th and signed on the 28th day of May, 1898, for the amount of said warrants ($7,000) with 8 per cent. interest from June 6, 1876, until paid; and costs of suit, amounting to $215.35, as will more fully and at large appear from a copy of the judicial record filed herewith and made part of this application.

And they pray that the master examine and establish their claim under said decree, and certify the same to the court for payment out of the trust fund established for the benefit of holders of drainage warrants; and especially that they be allowed 8 per cent. interest on

said warrants from June 6, 1876, until paid, and the costs incurred in said suit at law.

(Signed) C. S. RICE,
R. DE GRAY,
ROUSE & GRANT, *Solicitors.*

For exhibit to claim see page 74.

Claim of Mrs. Lytle, Tutrix, 3 *Warrants,* $12,000.

Filed before master Jan. 6, 1899, and filed in court with report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

Before A. G. Brice, master.

And now comes Mrs. Eliza J. Lytle (widow) dative tutrix of minor heirs of Frank A. Lee late of New Orleans, deceased, and accepting the benefit of the proceedings in the above-entitled cause and of the final decree rendered therein on the 5th day of December, 1898, presents and files with the master the following drainage warrants owned by her, dated June 6th, 1876, which are of the same character as those sued on by the complainant, viz:

Drainage warrant No. 331 for	$5,000
Drainage warrant No. 332 for	5,000
Drainage warrant No. 398 for	2,000

And claimant prays that her rights as holder of said warrants and creditor of the city of New Orleans may be established in this proceeding, and that the amount due on said warrants, including eight per cent. interest thereon, per annum, from June 6th, 1876, may be found and certified to the court to be paid out of the trust fund established by said decree.

And she prays for all such further relief as the master and the court are competent to give, and for costs.

(Signed) SAUNDERS & MILLER,
Sol'rs for Mrs. E. J. Lytle, Tutrix, etc.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Of Counsel.

Claim of Suffolk National Bank.

Filed with warrants marked 68 to 73, incl., before master, December 10, 1898, and filed in court with report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before A. G. Brice, Esq., master.

Now comes the Suffolk National Bank of Boston, and accepting the benefit of the proceedings in the above-entitled cause, and of the final decree entered therein on the 5th day of December, 1898, presents and files with the master the following drainage warrants dated June 6, 1876, owned by it, which are of the same class and character as those sued on by complainant, viz:

Drainage warrant	No.	313	for	.....	$10,000 00
"	"	314	"	.....	10,000 00
"	"	315	"	.....	10,000 00
"	"	316	"	.....	10,000 00
"	"	317	"	.....	10,000 00
"	"	318	"	.....	10,000 00

And said bank prays that its rights as holder of said warrants and creditor of the defendant may be established in this proceeding; and that the amount of said warrants with 8 per cent. interest per annum thereon from June 6, 1876, the date when the same were presented for payment may be found and certified to the court as payable out of the trust fund established by said decree; and it prays for all such general relief in the premises as the master and the court *is* competent to give under said decree, and for costs.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Sol'rs for Claimant.

Claim of John J. Donaldson.

Filed with warrants marked 67, before master, December 10, 1898, and filed in court with report March 7, 1900.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Now comes John J. Donaldson, and accepting the benefit of the proceedings in the above-entitled cause, and of the final decree entered therein on the 5th day of December, 1898, files and presents to the master the following drainage warrant dated June 6, 1876,

owned by him, which is of the same class and character as those sued on by the complainant, viz:

Drainage warrant No. 399 for..... $2,000 00

And he prays that his rights as holder of said warrant and creditor of the defendant may be established in this proceeding; and that the amount due on said warrant including 8 per cent. interest thereon per annum from June 6, 1876, the date when the same was presented for payment, may be found and certified to the court as payable out of the trust fund created by said decree; and he prays for all such general relief in the premises as the master and the court are competent to give under said decree, and for costs.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Sols. for Claimant.

SCHEDULE 1. Filed March 7th, 1900.

Assessment of drainage taxes against the city of New Orleans on streets and squares and 6% interest from date of homologation.

First district:	
Rolls homologated March 21, 1874, as per itemized statement pages 42 to 45 of transcript.....	$223,205 60
Interest from March 21, 1874, to Dec. 5, 1898, at 6%—24 years and 260 days.....	331,088 30
Second district:	
Rolls homologated in Jefferson parish March 16, 1869, as per itemized statement pages 51 and 52 of transcript.....	123,751 99
Interest from March 16, 1869, to Dec. 5, 1898, at 6%—29 years and 265 days.....	220,794 17
Rolls homologated in Orleans parish, Nov. 11, 1868, as per itemized statement pages 63 to 65 of transcript.....	71,428 20
Interest from Nov. 11, 1868, to Dec. 5, 1898, at 6%—30 years and 25 days.....	128,868 37
Third district:	
Rolls homologated November 8, 1872, as per itemized statement pages 75 and 76 of transcript.....	207,270 19
Interest from November 8, 1872, to Dec. 5, 1898, at 6%—26 years and 28 days.....	324,308 75
Fourth district:	
Rolls homologated March 21, 1873, as per judgment, page 88 of transcript and agreement marked "Defendant S," page 543 of transcript.....	65,956 75
Interest from March 21, 1873, to Dec. 5, 1898, at 6%—25 years and 260 days.....	101,793 25
Total assessments and interest.....	$1,798,465 57

Filed Dec. 16, 1898.

A. G. BRICE, *Master.*

SCHEDULE 2. Filed March 7th, 1900.

Assessments of Drainage Taxes Against Private Property and 6% Interest from the 21st Day of March, 1874.

First district:			
Total assessments of district as appears in record of Peake case, No. 11614 U. S. C. court, document marked "Recapitulation of assessments and collections by board of commissioners," etc..		$751,401 80	
Deduct—			
Amount assessments asylums, etc.....	$171,239 11		
Amount collected by commissioners.....	79,448 67		
		250,687 78	
		$500,714 02	
Deduct amount assessment on city property, streets, etc		223,205 60	
Balance transferred to city authorities.....			$277,508 42
Second district:			
Total assessments of district as appears in above-described documents, Peake case.....		$545,400 35	
Deduct amount collected by commissioners.....	$255,492 95		
Deduct amount assessments city property, streets, etc..	195,170 19		
		450,663 14	
Balance transferred to city authorities.....			94,737 21
Third district:			
Total assessment of district as appears in above-described document Peake case..		$627,598 93	
Deduct amount assessments city property, streets, etc.....		207,270 19	
Private property assessments.....			$420,328 74
Total			$1,008,034 41

Deduct—		
Amount drainage taxes collected and expended by the city of New Orleans to October, 1888. See recapitulation, pages 320 and 321 of transcript.....	$273,401 85	
Collections from October, 1888, to June 20, 1891, page 344 of transcript.....	2,728 02	
Collections by Gurley, receiver, page 214 transcript.....	5,749 15	
Collections by Gasquet, receiver, page 214 transcript.....	1,134 85	
Collections by Fontaine, receiver, page 488 transcript.....	79 00	
		$283,092 87
Balance due		$724,941 54
Interest on this balance computed from March 21, 1874, the date of the last judgment of homologation, to Dec. 5, 1898, by suggestion of counsel for complainant, at 6%—24 years and 260 days.....		1,075,329 95
		$1,800,271 49

Filed Dec. 16, 1898.

A. G. BRICE, *Master.*

Motion to File and Record Mandate of the U. S. Supreme Court.

Filed March 7, 1900, and filed before master February 21, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, JOANNA E. MCCROSSIN, Mary E. Warner, and Harry Warner, Substituted,
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray and Rouse & Grant, solicitors for complainants, and on suggesting to the court that since the filing of the mandate of the United States circuit court of appeals for the fifth circuit herein, on the 5th day of December, 1898, and the entry of the judgment and decree based thereon, under which the case was referred to A. G. Brice, Esq., master in chancery to examine and report pursuant to said decree, this cause was removed to the Supreme Court of the United States on writ of certiorari, where, after due proceedings, the decree of said United States circuit court of appeals was affirmed with costs, on the 15th day of January, 1900, as per the mandate of said Supreme Court now presented.

It is ordered that said mandate be now filed and that the decree of the Supreme Court therein contained in the words and figures following, be recorded, to wit:

"It is now here ordered, adjudged and decreed by this court that

the decree of said United States circuit court of appeals in this cause be, and the same is hereby, affirmed with costs; and that the said appellant, John G. Warner, recover against the said appellee for his costs herein expended and have execution therefor,

"And it is further ordered that this cause be, and the same is hereby remanded to the circuit court of the United States for the eastern district of Louisiana with a direction to comply with the decree of 'the circuit court of appeals.'"

And it is now ordered by this court that the master herein proceed forthwith with his accounting and report in accordance with the decree herein entered on said 5th day of December, 1898, pursuant to the decree of said United States circuit court of appeals, affirmed as aforesaid with a direction to this hon. court to comply therewith.

Signed as of date February 19th, 1900, *nunc pro tunc.*

(Signed) CHARLES PARLANGE, *U. S. Judge.*

Feb. 20, 1900.

CLERK'S OFFICE.

I certify the foregoing to be a true copy of the original on file.

(Signed) E. R. HUNT, *Clerk,*

[SEAL.] By H. J. CARTER, *D'y Clerk.*

Complainants' Additional Offering.

Filed March 7, 1900; filed before master February 26, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, ET ALS., Substituted, *vs.* THE CITY OF NEW ORLEANS. } No. 12350.

Complainant produces and offers in evidence—in addition to the offerings heretofore made—the following extract taken from the offering of the city of New Orleans (statement of drainage warrants issued) filed in the case of Peake *vs.* New Orleans, and found on page 587 of the printed record (U. S. Supreme Court) of said Peake case, namely—

"Issued in conformity with ordinance No. 3539, A. S., dated May 23, 1876, warrants Nos. 313 to 392, inclusive..	$300,000
"Issued in compromise of judgment against the city of New Orleans for $24,000. For drainage tax due on New Orleans park, warrrants Nos. 393 to 402, inclusive..	20,000"

Defendant's Offer of Evidence.

Filed Feb. 26, 1900, before master, and filed in court March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before Honorable A. G. Brice, special master.

Defendant offered, introduces and files in evidence:

1. Statement of purchase warrants, or warrants issued June 6th, 1876, under—

The act of sale of June 7th, 1876, by the Mississippi & Mexican Gulf Ship Canal Company and Warner Van Norden to the city of New Orleans, before Gustave Legardeur, notary public.

		Number of warrant.	Amount of warrant.
1876.	June 6	313	$10,000
	" "	314	10,000
	" "	315	10,000
	" "	316	10,000
	" "	317	10,000
	" "	318	10,000
	" "	319	10,000
	" "	320	10,000
	" "	321	10,000
	" "	322	10,000
	" "	323	5,000
	" "	324	5,000
	" "	325	5,000
	" "	326	5,000
	" "	327	5,000
	" "	328	5,000
	" "	329	5,000
	" "	330	5,000
	" "	331	5,000
	" "	332	5,000
	" "	333	5,000
	" "	334	5,000
	" "	335	5,000
	" "	336	5,000
	" "	337	5,000
	" "	338	5,000
	" "	339	5,000
	" "	340	5,000
	" "	341	5,000
	" "	342	5,000

1876.	June 6	343	2,000
	" "	344	2,000
	" "	345	2,000
	" "	346	2,000
	" "	347	2,000
	" "	348	2,000
	" "	349	2,000
	" "	350	2,000
	" "	351	2,000
	" "	352	2,000
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	" "	388	2,000
	" "	389	2,000
	" "	390	2,000
	" "	391	2,000
	" "	392	2,000
	" "	393	2,000

1876.	June 6	394	2,000
	" "	395	2,000
	" "	396	2,000
	" "	397	2,000
	" "	398	2,000
	" "	399	2,000
	" "	402	2,000

Warrants Nos. 400 and 401 paid.

2. Report of T. S. Hardee, city surveyor, showing inventory and appraisement of the effects of the Mississippi & Mexican Gulf Ship Canal Company to be transferred to the city of New Orleans under the above act, being page No. 117 and following of Record No. 364, U. S. circuit court of appeals.

3. Hearing and submission in the case of J. W. Peake *vs.* City of New Orleans, No. 11614, United States circuit court for the eastern district of Louisiana, as shown by an extract from the minutes of said court found on pages 102 *et seq.*, of the printed record of said cause.

4. Agreement as to the transcript in said case, as found on page 779 of the said printed record.

5. Decree in the same cause, as found on page 779 of the said record.

6. Motion and order for appeal, and bond for appeal, in the same cause, as found on page 780 of the said record.

7. Ordinances of the city of New Orleans Nos. 3479 and 3539, both administration series, found on pages 104 and 105 of the printed record of said cause, being found on page 134 of record 364, U. S. circuit court of appeals.

8. Report of O. B. Sansum, master, in J. W. Peake *vs.* City of New Orleans, No. 11614, United States circuit court for the eastern district of Louisiana, as found in the printed record of said case, pp. 49 to 94, inclusive.

9. Exceptions to master's report, page 95 and following of Peake case.

It is stipulated, that all of the offerings above made which are contained in the printed records of this case and the said case of Peake *vs.* New Orleans, shall be read from the same, without the necessity of separately copying the said offers, and putting them in the record; such offers in this form to be taken, considered, and construed the same as though each were physically filed as a separate document in this proceeding.

Agreement as to Transcript.

Filed March 31, 1900.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

It is admitted that all the drainage warrants produced, offered and filed in evidence before the master and filed with his report in this hon. court are in the same form and of the same date as those of the complainant (of which a sample copy is to be found on page 141 of the "Transcript of Record" in the suit entitled John G. Warner *vs.* The City of New Orleans, No. 364 on the docket of the United States circuit court of appeals for the fifth circuit) and only differ therefrom in the number and amount of each warrant.

And it is further admitted that the number and amount of each warrant so offered and filed is correctly stated by the master in his process verbal on file herein.

And it is agreed that in making the transcript, the clerk of this hon. court shall not copy each or any of said warrants offered and filed as aforesaid, but that this admission and agreement stand in the place thereof.

New Orleans, March 30, 1900.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

(Signed) S. L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Defendant.

Report of T. S. Hardee, city surveyor, showing inventory and appraisement of the effects of the Mississippi & Mexican Gulf Ship Canal Company to be transferred to the city of New Orleans under the above act.

NOTE.—To be read from page No. 117 and following of printed Record No. 364, U. S. circuit court of appeals, as per stipulation, p. 67 of this transcript.

Hearing and submission in the case of J. W. Peake *vs.* City of New Orleans, No. 11614 United States circuit court for the eastern district of Louisiana, as shown by an extract from the minutes of said court found on pages 102 *et seq.*, of the printed record of said cause.

NOTE.—To be omitted from the transcript hereof, as per agreement at page 82 hereof.

(J. W. Peake *vs.* City, No. 11614, U. S. circuit court, eastern dist. La.)

Agreement as to the transcript in said case, as found on page 779 of the said printed record.

NOTE.—To be omitted from the transcript hereof, as per agreement at page 82 of this transcript.

Decree in the same cause, as found on page 779 of the said record, J. W. Peake *vs.* City, No. 11614, U. S. circuit court, eastern dist. of La.

NOTE.—To be read from the printed Record No. 364, U. S. circuit court of appeals, as per stipulation copied at page 67 of this transcript.

Motion and order for appeal, and bond for appeal, in the same cause (J. W. Peake *vs.* City, No. 11614, U. S. circuit court, eastern dist. of La.) as found on page 780 of the said record.

NOTE.—To be read from the printed Record No. 364, U. S. circuit court of appeals, as per stipulation copied at page 67 of this transcript.

Ordinances of the city of New Orleans No. 3479 and 3539, both administration series, found on pages 104 and 105 of the printed record of said case (J. W. Peake *vs.* City, No. 11614, U. S. circuit court, eastern dist. of La.).

NOTE.—To be read from page 134 of printed Record 364, U. S. circuit court of appeals, as per stipulation at page 67 of this transcript.

Report of O. B. Sansum, master, in J. W. Peake *vs.* City of New Orleans, No. 11614 United States circuit court for the eastern district of Louisiana, as found in the printed record of said case, pp. 49 to 94, inclusive.

NOTE.—To be omitted from this transcript, as per agreement copied at page 82 hereof.

Exceptions to master's report, page 95 and following of Peake case.

NOTE.—To be read from the printed record of the case of Peake *vs.* New Orleans, as per stipulation copied at page 67 of this transcript.

Offer of Evidence.

Filed March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Before Honorable A. G. Brice, master.

Defendant offers, introduces and files in evidence the following:

Testimony of James B. Guthrie, found on pages 364 *et seq.*, of the printed record of this case, No. 640, of the Supreme Court of the United States, being page 213 of Record No. 691, U. S. circuit court of appeals.

Testimony of J. W. Gurley, found on pages 386, *et seq.*, of the said record, being page 237 of Record No. 691, U. S. circuit court of appeals.

Testimony of Joseph Desposito, found on pages 432, *et seq.*, of the said record, being page 289 of Record No. 691, U. S. circuit court of appeals.

Testimony of N. J. Hoey, found on pages 406, *et seq.*, of the said record, being page 260 of Record No. 691, U. S. circuit court of appeals.

Testimony of W. I. Hodgson, found on pages 422, *et seq.*, of the said record, being page 277 of Record No. 691, U. S. circuit court of appeals.

Report of special committee of the council of the city of New Orleans on drainage taxes, found on pages 349, *et seq.*, of the said record, being page 195 of Record No. 691, U. S. circuit court of appeals.

Testimony of Juste Fontaine, Jr., found on pages 487, *et seq.*, of the said record, being page 352 of Record 691, U. S. circuit court of appeals.

Statement of drainage taxes paid the city of New Orleans, from October 30th, 1888, to June 20th, 1891, found on pages 343, *et seq.*, of the said record, being pages 188 of Record 691, U. S. circuit court of appeals.

Bill, answer, and order appointing receiver, in the case of James W. Peake *vs.* City of New Orleans, No. 1208 of the circuit court of the United States for the eastern district of Louisiana, found on pages 489, *et seq.*, of the said record, being page No. 355 of Record 691, U. S. circuit court of appeals.

Also the agreement described in the note following the city's answer, found on page 496 of the said record, being page 369 of Record 691, U. S. circuit court of appeals.

Testimony of Juste Fontaine, Jr., taken anew in this proceeding before the Honorable A. G. Brice, master.

Testimony of James B. Guthrie, found on pages 364, *et seq.*, of the printed record of this case, No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 213 of Record No. 691, U. S. circuit court of appeals.

Testimony of J. W. Gurley, found on pages 386, *et seq.*, of the said Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 237 of Record No. 691, U. S. circuit court of appeals.

Testimony of Joseph Desposito, found on pages 432, *et seq.*, of printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 289 of Record No. 691, U. S. circuit court of appeals.

Testimony of N. J. Hoey, found on pages 406, *et seq.*, of printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 260 of Record No. 691, U. S. circuit court of appeals.

Testimony of W. I. Hodgson, found on pages 422, *et seq.*, of the printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found on page 277 of Record No. 691, U. S. circuit court of appeals.

Report of special committee of the council of the city of New Orleans on drainage taxes, found on pages 349, *et seq.*, of the printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 195 of Record 691, U. S. circuit court of appeals.

Testimony of Juste Fontaine, Jr., found on pages 487, *et seq.*, of the printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 352 of Record 691, U. S. circuit court of appeals.

Statement of drainage taxes paid the city of New Orleans, from October 30th, 1888, to June 20th, 1891, found on pages 343, *et seq.*, of printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found at page 188 of Record 691, U. S. circuit court of appeals.

Bill, answer, and order appointing receiver, in the case of James W. Peake *vs.* City of New Orleans, No. 12008 of the circuit court of the United States for the eastern district of Louisiana, found on pages 489, *et seq.*, of printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found on page 355 of Record 691, U. S. circuit court of appeals.

Agreement described in the note following the city's answer, found on page 496 of the printed Record No. 640 of the Supreme Court of the United States.

NOTE.—To be found on page 369 of the Record 691, U. S. circuit court of appeals.

Testimony of Juste Fontaine, Jr., taken anew in this proceeding before the Honorable A. G. Brice, master.

NOTE.—Copied at page 44, *et seq.*, of this transcript.

Exceptions to Report of A. G. Brice, Special Master.

Filed March 10th, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

Exceptions taken by defendant to the report herein made by the Hon. A. G. Brice, special master herein, on the claims of intervenors, save and excepting that of James Jackson.

First. That there is error in charging defendant with liability for the whole of the uncollected assessments against private property, or property owned by private persons, because the evidence before said master shows that all such taxes as could be or were susceptible of

collection have been collected and paid over to the parties and purposes for which they were assessed.

Second. That the advantages and the decree herein, under which this reference is made extend only to such warrants as were used in payment of the property purchased by the act before G. Legardeur, notary public, of date June 7, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amount*ing* to $153,750.00 and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the circuit court of appeals and of the supreme court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden, against the city of New Orleans; that of said warrants, besides those issued in settlement of said claim for damages, the sum of $20,000.00 were issued, as will appear by the express terms of the said act in satisfaction of that amount of drainage taxes collected by the city of New Orleans prior to June 6, 1876, and applied to general-fund purposes, and hence, that as to these warrants, in any event, there could be no recovery or allowance made; that in any event, the decree in the suit of J. W. Peake *vs.* City of New Orleans, No. 11614 of the United States circuit court for the eastern district of Louisiana, -as *res adjudicata* in favor of this defendant.

That although there is no mark or sign upon any of the said warrants, which were issued in payment of the price of the property purchased, which were given in settlement of the claim for damages, and which were executed and delivered in payment for drainage work which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payment of the price of said property, and which were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution, first for the payment of the price of the property purchased, next to the settlement of the claim for damages, and lastly for the payment for work mentioned in said notarial act; that all of said warrants bear date June 6, 1876, the first one bearing the number 313, and ran up to and inclusive of the number 402, as is shown by the statement of the said warrants contained in the record, as well as the warrants themselves, offered in evidence.

That from an examination of the said warrants, and a comparison of their numbers, it will be seen, that with the issuance of warrant No. 332 there had been reached an issue of $150,000.00, adding to which warrant 333, for $5,000.00, would make a total issue of $155,000.00, or a difference of $1,250.00 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.

Agreement.

Filed March 24, 1900.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

It is hereby stipulated and agreed, that the following shall be pasted over the last nine lines at the bottom of the first page of exceptions to the master's report herein, to stand in lieu thereof, to wit:

"preme court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden against the city of New Orleans; that of said warrants, besides those issued in settlement of said claim for damages, the sum of $20,000.00 were issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the city of New Orleans prior to June 6, 1876, and applied to general-fund purposes."

That the above states the question which was argued on the hearing of the exceptions, and not the question, in manner and form, as stated in said exceptions as originally drawn.

It is further stipulated and agreed, that the above matter set out may be considered by the court, whether or not the same was set out, in manner and form as above set forth, in the exceptions filed before the master.

(Signed) RICHARD DE GRAY,
Solicitor for Complainant.
S. L. GILMORE,
City Attorney.
BRANCH K. MILLER,
Solicitor for Def'ts.

March 24, 1900.

Decree.

Filed March 26, 1900.

United States Circuit Court for the Eastern District of Louisiana.

JOHN G. WARNER, ANN WARNER, JOANNA E. McCROSSIN, Mary E. Warner, and Harry Warner, Substituted,
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

This cause came on to be finally heard at the present term, upon the bill and its amendments, the respondents' answer thereto and the replication of the complainant, and upon the interventions of the warrant-holders who have filed their claims before the master,

the proofs and the master's report and the defendant's exceptions thereto, and was argued by counsel for the respective parishes; whereupon in consideration thereof it was ordered, adjudged and decreed as follows:

First.

It is ordered that the report of A. G. Brice, Esq., master, made pursuant to the decretal of this court dated December 5, 1898, and filed in the clerk's office, March 7, 1900, be, and the same is hereby approved and confirmed, and the exceptions of defendant thereto be overruled.

Second.

The court finds in accordance with the report of said master, and decrees that the defendant is chargeable with and owes drainage taxes assessed against it upon the area of the streets, squares and public places within the several drainage districts of the city of New Orleans, under the provisions of the acts of the legislature of the State of Louisiana as set forth in the bill of complaint, to the amount of one million eight hundred and fifty thousand three hundred and thirty-six and $\frac{52}{100}$ dollars ($1,850,336.52); that the defendant is indebted in said sum to the drainage fund established by the decree of December, 1898, as a trust fund for the benefit of the complainants and of all other holders of drainage warrants similar to those of the complainants who have established their claims before the master; that said fund so due and owing by the defendant is more than sufficient in amount to pay all the drainage warrants issued by defendant under authority of the act of the legislature of the State of Louisiana of February 24, 1876, in principal and interest, as appears from the master's report, and that the complainants and the intervening claimants are, respectively, entitled to absolute judgments against the defendant for the several amounts in principal, interest, and for costs, as found by the master in his report.

Third.

It is therefore ordered, adjudged and decreed as follows:

1st. That Ann Warner, Joanna E. McCrossin, Mary E. Warner and Harry Warner, the legal heirs of John G. Warner, deceased, who have been substituted to his rights herein, do have and recover absolute judgment against the defendant, The City of New Orleans, for the sum of six thousand dollars, with eight per cent. per annum interest thereon from June 6, 1876, until the same is paid, with all costs of his suit, and that complainants have execution against the defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

2nd. That John Crossley & Sons (Limited), whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of one hundred and forty-nine thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid,

with costs and that it have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

3rd. That Wilder & Co., whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of seven thousand dollars, with interest from June 6th, 1876, at the rate of eight per cent. per annum until paid with costs herein, and the further sum of two hundred and fifteen and $\frac{35}{100}$ dollars, their costs in their suit at law against the city of New Orleans in this court, wherein they recovered judgment on their warrants for the aforesaid sum of seven thousand dollars, and that they have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

4th. That F. J. Gasquet, whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of thirty thousand dollars, with interest from June 6th, 1876, at the rate of eight per cent. per annum until paid with costs and that he have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

5th. That the Suffolk national bank, whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans, for the sum of sixty thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid, with costs, and that it have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

6th. That Mrs. Frank N. Butler, widow in community and as executrix of the will of Frank N. Butler, deceased, and Mary E. Taliaferro, whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of five thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid, with costs, and that they have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

7th. That John J. Donaldson, whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the sum of two thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid, with costs, and that he have execution against the defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the equity rules established by the supreme court.

8th. That Mrs. Eliza J. Lyttle, dative tutor, &c.; whose claim has been established before said master, do have and recover absolute judgment against the defendant, The City of New Orleans for the

sum of twelve thousand dollars, with interest from June 6, 1876, at the rate of eight per cent. per annum until paid, with costs, and that she have execution against defendant therefor as in case of suits at common law in actions of assumpsit, according to rule eight of the rules in equity established by the supreme court.

All rights of James Jackson, whose claim is mentioned in the report of the master and not reported on by said master, are reserved until the coming in and consideration of the said master's report on said claim, and the bill is retained for that purpose.

(Signed) CHARLES PARLANGE,
U. S. Judge.

New Orleans, March 26, 1900.

Agreement as to Transcript.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

It is agreed that in making up the transcript for the appeal from the decrees entered herein on the 26th day of March, 1900, in favor of the Warner heirs, John Crossley & Sons, Limited, Wilder & Co., F. J. Gasquet, Suffolk National Bank, Mrs. F. N. Butler, and Mrs. Mary E. Taliaferro, John J. Donaldson, and Mrs. Eliza J. Lyttle, that the clerk may omit therefrom the following offerings by the defendant, which concern the claim presented before the master by James Jackson and not yet reported on by him nor acted on by the court, viz:

"3. Hearing and submission in the case of J. W. Peake *vs.* City of New Orleans, No. 11614 United States circuit court for the eastern district of Louisiana, as shown by an extract from the minutes of said court found on pages 102 *et seq.*, of the printed record of said cause."

"4. Agreement as to the transcript in said case, as found on pages 779 of said printed record."

"6. Motion and order for appeal, and bond for appeal, in the same cause, as found on page 780 of said record."

"8. Report of O. B. Sansum, master, in J. W. Peake *vs.* City of New Orleans, No. 11614 United States circuit court for the eastern district of Louisiana, as found in the printed record of said case pp. 49 to 94 inclusive."

And it is admitted that the following offers made by defendant before the master are already in the United States circuit court of appeals in the printed record of this case, to wit: Bill, answer and decree in the case of Peake *vs.* New Orleans, No. 11614 U. S. circuit court, found on pages 142, 160, 359 of Supreme Court Record in the case of New Orleans *vs.* Warner, are to be found as follows:

1st. Said bill and answer on pages 185 and 310 of Record No. 364 U. S. circuit court of appeals, and said decree on page 207 of Record 691, United States circuit court of appeals.

2nd. Intervening bill of James Jackson, found on page 358 of said Supreme Court Record, is found on page 205 of Record 691 U. S. circuit court of appeals.

3rd. Petition, answer and judgment in Jackson *vs.* New Orleans found on pages 361, 362, 363 of said Supreme Court Record are found on pages 208, 209, 210 and 211 of Record 691 U. S. circuit court of appeals.

And said offerings being already in the transcript of record in this case already on file in the United States circuit court of appeals it is agreed that the same be *ad*mitted from the present transcript.

(Signed) S. L. GILMORE, *City Att'y,*
(Signed) BRANCH K. MILLER,
Solicitor- for Defendant.
(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

Motion and Order for Appeal.

Filed April 6th, 1900.

United States Circuit Court, Eastern District of Louisiana. In Equity.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

And now comes the respondent, The City of New Orleans, by Samuel L. Gilmore, city attorney, and Branch K. Miller, its solicitors, in open court, and on suggesting to the court that respondent conceives itself aggrieved by, and that there is error in, the final order or decree of this court rendered and signed on the 26th day of March, 1900, and that respondent desires to appeal therefrom, the assignment of errors this day filed being duly considered,

It is ordered, in open court, that respondent, The City of New Orleans, be allowed an appeal from the said order or decree, without supersedeas, returnable to the United States court of appeals for the fifth circuit, within thirty days from the date of the entry hereof, upon respondent furnishing bond, conditioned according to law, in the sum of five hundred dollars, with good and solvent security.

(Signed) CHARLES PARLANGE,
U. S. Judge.

New Orleans, La., April 6th, 1900.

Assignment of Errors.

Filed April 6th, 1900.

United States Circuit Court, Eastern District of Louisiana. In Equity.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

And now, on the 5th day of April, 1900, came the said respondent, by Samuel L. Gilmore, city attorney, and Branch K. Miller, its solicitors, and says that the decrees in the said cause is erroneous, and against the just rights of the said respondent, for the following reasons:

First. That the court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this court on the — day of March, 1900; that the court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second. That from the evidence before the court, accompanying the said report, it conclusively appeared that the dredge-boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the city of New Orleans from Warner Van Norden and the Mexican Gulf & Ship Canal Company, by authentic act before G. Le Gardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the city of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third. That as to the $20,000 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the city of New Orleans to other than drainage-fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of this court, or of the Supreme Court of the United States, in this cause; that the circuit court erred in admitting them to any participation in the fund ascertained by the master to be due by the city of New Orleans, or to their payment out of the same.

Fourth. That as to the remainder of the $320,000 issued, as shown by the said act of sale from Van Norden and said company

to the city of New Orleans, that is, the residue after deducting the said $153,750, the value of the dredge-boats, etc., and $20,000, in satisfaction of drainage taxes claimed to have been diverted, to wit, $146,250, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the city of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work by the city of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that, in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750, while, as a matter of fact, the whole amount of the $320,000 of warrants issued by the city *were* decreed to be payable out of the said funds, save $4,000 thereof, which *has* been paid, in which finding the court was in error.

Fifth. That warrants to the extent only of $153,750 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth. That the court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a unit, in which there was error; that the court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750, ascertained as aforesaid.

Seventh. That the court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided,

adversely to respondent, in the prior decrees in this cause, made and entered by this court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been considered by this court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either court; that the circuit court erred in so holding, and should have held the reverse.

Wherefore respondent prays that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of the defendant on the exceptions to the report of the said special master.

(Signed) SAMUEL L. GILMORE,
City Attorney,

(Signed) BRANCH K. MILLER,
Solicitors for Defendant.

Bond.

Filed April 7th, 1900.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

Know all men by these presents, that we, The City of New Orleans, as principal, and Robert M. Walmsley, as surety, are held and firmly bound unto John G. Warner, John Crossley & Sons, Wilder & Co., Francis J. Gasquet, The Suffolk National Bank, Succession of Frank N. Butler, and Mary E. Taliaferro, Mrs. Eliza J. Lyttle, natural tutrix, appellees, in the full and just sum of five hundred dollars, to be paid to the said John G. Warner and others above named, appellees, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 7th day of April, in the year of our Lord one thousand nine hundred.

Whereas, lately at a circuit court of the United States for the eastern district of Louisiana in a suit depending in said court, between the said John G. Warner and the other parties above named appellees and the said City of New Orleans, a decree was rendered against the said City of New Orleans and the said City of New Orleans having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said John G. Warner and the other parties above named, citing and admonishing them to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof:

Now, the condition of the above obligation is such, that if the said City of New Orleans shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make its plea good, then

the above obligation to be void; else to remain in full force and virtue.

(Signed) CITY OF NEW ORLEANS,
By A. BRITTIN, *Acting Mayor.*
[SEAL.]
[SEAL.] (Signed) R. M. WALMSLEY.

Approved by—
(Signed) CHARLES PARLANGE,
U. S. Judge.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing 89 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had from Dec. 5, 1898, together with all the evidence adduced on the trial of the case of John G. Warner *vs.* The City of New Orleans, No. 12350, of the docket of the said court; except such evidence as has been omitted under the agreements printed at pages 82, 83.

Witness my hand and the seal of said court, at the city of New Orleans, this 7th day of April, A. D. 1900.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 7th day of April, A. D. 1900.

CHARLES PARLANGE, *Judge.*

United States Circuit Court of Appeals for the Fifth Circuit.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees. } No. 928.

It is admitted that the following petition, answer and bills of cost were duly filed with and are a part of the claim of Wilder & Co., that the same were duly offered in evidence before master and constitute a part of the record in this case, and through inadvertence were omitted therefrom, and it is agreed that printed copies thereof

may be attached to the last pages of the printed transcript, constituting pages 74, 75, and following.

New Orleans, April 16, 1900.

RICHARD DE GRAY,
ROUSE & GRANT,
Sol'rs for Appellees.
S. L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Defendant.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

JOHN G. WARNER, Appellee,
vs.
THE CITY OF NEW ORLEANS, Appellant. } No. 12350. In Equity.

On appeal to the honorable United States circuit court of appeals for the fifth circuit from the circuit court of the United States for the eastern district of Louisiana, New Orleans division.

Supplemental Transcript

Of the amended petition, exception and answer, judgment on mandate and judgment of award, and taxed cost bills in the case of Wilder & Company *vs.* City of New Orleans, No. 11380, U. S. circuit court, eastern district of Louisiana, offered and filed before A. G. Brice, master, and offered by complainants on the trial before the court.

Index.

	Page.
Amended petition	1
Exception and answer	3
Judgment on mandate of U. S. circuit court of appeals	4
Mandate	5
Judgment	5
Clerk's certificate	6
Cost bills of clerk U. S. circuit court, clerk U. S. circuit court of appeals, and of the U. S. marshal	7 and 8
Clerk's certificate as to transcript	

Copy of Amended Petition, Exception and Answer, Judgment on Mandate, and Judgment of Award.

Filed before master December 10, 1898, and filed in court March 7th, 1900.

Amended Petition.

Filed Dec. 10, 1894.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

WILDER & Co.
vs.
CITY OF NEW ORLEANS. } No. 11380.

And now come plaintiffs in the above entitled and numbered cause and leave of court being first had and obtained and amend their petition and supplemental petition filed herein, so as to read as follows, to wit:

The petition of C. T. Wilder, H. A. Wilder and of the commercial firm of Wilder and Company, composed of said C. T. Wilder and H. A. Wilder residents of Boston, Massachusetts, and citizens of the State of Massachusetts, respectfully shows:

That petitioners are the holders and owners of two certain drainage warrants each dated June 6, 1876, one for $2,000—one for $5,000—issued by the city of New Orleans, a municipal corporation of the State of Louisiana and a citizen of said State of Louisiana to Warner Van Norden, of the city of New York, a resident and a citizen of the State of New York, who could sue on the same in this hon. court, and by said Van Norden endorsed, which are on file herein, and made part hereof, being part of a lot of $320,000—delivered for the purchase of certain property described in an act of sale passed before G. Le Gardeur, Jr., notary public, dated June 7, 1876, filed herewith and made part hereof. All issued and delivered under and pursuant to an act of the legislature approved March 24, 1876, being No. 16 of that year, and payable out of drainage-tax assessments, created under and pursuant to the following described acts of said legislature of Louisiana, to wit: Act No. 165 approved March 18, 1858, No. 191 approved March 17, 1859, No. 57 approved March 1, 1861, and act No. 30 of the year 1871.

Petitioners allege amicable demand and refusal to pay.

Wherefore, petitioners pray for the citation of and after due proceedings judgment against said city of New Orleans as assignee, transferee and subrogee under act 30 of the legislature of the State of Louisiana of all the rights, powers and facilities possessed by the drainage commissioners of the several drainage districts referred to in said act, and act No. 165 of March 18, 1858, act No. 191 of March 17, 1859, act No. 57 of March 1, 1861, of the legislature of the State of Louisiana and the various acts of the said legislature supple-

mentary thereto and amendatory thereof or in anywise pertaining to the drainage of New Orleans and Jefferson and charged with the liabilities and responsibilities imposed under said acts for the sum of $7,000—seven thousand dollars—with 8 % interest per annum from June 6, 1876, until paid and all costs, payable out of drainage-tax assessments and judgments created under and in pursuance of said acts No. 165 of 1858, No. 191 of 1859, No. 57 of 1861, and act No. 30 of 1871 and act No. 16 of March 24, 1876.

Petitioner- further prays for all general relief.

(Signed) RICHARD DE GRAY,
CHAS. S. RICE, *Of Counsel.*

Let the within amended petition be filed and process issue.
New Orleans, Dec. 10, 1894.

(Signed) CHARLES PARLANGE, *Judge.*

Exception and Answer.

Filed January 5, 1895.

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

WILDER & CO.
vs.
CITY OF NEW ORLEANS. } No. 11380.

Now into court comes the City of New Orleans, and for peremptory exception to plaintiff's demand, says: That this suit is improperly prosecuted against the said city, all powers and liabilities appertaining to the drainage fund or tax having been withdrawn from said city, and vested in a receiver, by decree of this honorable court in suit of J. W. Peake *vs.* The City of New Orleans, No. 12008 of the docket of this honorable court.

That since said decree the city is without authority to stand in judgment, and this suit must be prosecuted against said receiver, and not against said city.

Wherefore, exceptor prays that this exception be maintained and that exceptor be dismissed from this suit with its costs.

But should this exception be overruled, said City of New Orleans, without waiving the same, for answer to plaintiff's demand says:

That it denies all and singular the allegations of plaintiff's petition except in so far as may hereinafter be admitted.

Further answering, defendant says that any and all drainage warrants that may have been issued by the city of New Orleans were issued by said city not in its character as a municipal corporation, but as a statutory trustee of the drainage fund.

That said trust has terminated by the appointment of a receiver, as aforesaid, all the assets and property of the drainage fund received by said city as trustee have been by said city turned over and

transferred to the said receiver, and the city is without authority or liability to stand in judgment in the premises.

Wherefore, defendant prays that plaintiff's demand be rejected with costs, and that, should there be judgment herein, said judgment should be restricted for payment to the drainage funds in the hands of the drainage receiver, and for general relief.

(Signed) HORACE L. DUFOUR,
Assistant City Att'y.

Judgment on Mandate of the U. S. Circuit Court of Appeals Awarding a New Trial.

Extract from the Minutes, April Term, 1898.

NEW ORLEANS, FRIDAY, *May* 6, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

WILDER & Co. *vs.* CITY OF NEW ORLEANS. } No. 11380.

On motion of C. S. Rice, R. De Gray and Rouse & Grant, attorneys for plaintiffs and upon their suggestion that the judgment rendered herein in favor of the defendant on the 5th and signed on the 15th day of February, 1895, has been reversed by the United States circuit court of appeals for the fifth circuit by its final decree dated April 12, 1898, as appears from the mandate of said court of appeals filed herewith:

It is now ordered that said mandate be filed and recorded, and in accordance with the directions therein contained that said judgment of this court rendered on the 5th and signed on the 15th day of February, 1895, be set aside and annulled, and that a new trial be granted the plaintiffs.

Mandate.

No. 409.

U. S. Circuit Court of Appeals for the Fifth Circuit, Nov. Term, 189–.

WILDER & Co. *vs.* CITY OF N. O. } No. 11380.

"And whereas, in the present term of November, in the year of our Lord one thousand eight hundred and ninety-seven the said cause came on to be heard before the said United States circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof,

It is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby

reversed, and this cause remanded to said circuit court with instruction to award a new trial.

It is further ordered and adjudged that the defendant in error The City of New Orleans be condemned to pay the costs of this cause in this court, for which execution may issue out of said circuit court.

April 12, 1898."

Judgment.

Extract from the Judgment Book No. 16, fo. 102.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division, April Term, 1898.

NEW ORLEANS, TUESDAY, *May* 24, 1898.

Court met pursuant to adjournment.

Present: Hon. Charles Swayne, district judge.

WILDER & CO.
vs.
THE CITY OF NEW ORLEANS. } 11380.

By reason of the verdict of the jury herein and in accordance therewith: It is ordered, adjudged and decreed that the plaintiffs, Wilder & Co., do have and recover of and from the defendant, The City of New Orleans, the sum of seven thousand dollars ($7,000.00) with 8 % interest per annum from June 6, 1876, until paid and all costs, payable out of drainage-tax assessments and judgments created and rendered under and in pursuance of said acts No. 165 of 1858, No. 191 of 1859, No. 57 of 1861 and No. 30 of 1871 and act No. 16 of March 24, 1876.

Judgment rendered May 24, 1898.

Judgment signed May 28, 1898.

(Signed) CHAS. SWAYNE, *Judge.*

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the U. S. circuit court for the eastern district of Louisiana, do hereby certify the foregoing to be a true copy of the original amended petition, exception and answer, judgment on mandate of U. S. circuit court of appeals, and judgment of award, all on file in this office, and now of record in the cause entitled Wilder & Company *vs.* The City of New Orleans, and numbered 11380 of the docket of this court.

Witness my hand and seal of said court, at the city of New Orleans, La., this 7th day of December, A. D. 1898.

[SEAL.] (Signed) E. R. HUNT, *Clerk,*
By H. J. CARTER, *Dy Clerk.*

Cost Bills.

Filed before Master A. G. Brice, Dec. 10, 1898, and returned and filed in court March 7, 1900.

United States Circuit Court, Eastern District of Louisiana.

NEW ORLEANS, *Dec.* 7, 1898.

WILDER & CO. *vs.* THE CITY OF N. O. } No. 11380.

Clerk's costs	$69 75
Attorney's docket fee, 2 trials at $20	40 00
	$109 75

In this case I certify that the taxed costs of clerk and attorneys' fees amount to one hundred and nine and $\frac{75}{100}$ dollars $109.75.

Attest: (Signed) E. R. HUNT, *Clerk*,
By J. H. C.

United States Circuit Court of Appeals, Fifth Circuit.

WILDER & COMPANY *vs.* CITY OF NEW ORLEANS. } No. 409. Taxed Against City of New Orleans.

Clerk's Costs.

Docketing cause and filing record	$5 00	
Transfer to subsequent docket	3 00	
2 appearance-	50	
Filing 29 papers	7 25	
Filing briefs for plaintiff in error	5 00	
Filing briefs for defendant in error	5 00	
Entering 1 orders	20	
Entering submission	20	
Entering judgment	1 00	
Mandate	5 00	
Supn., &c.	11 75	
Am't brought forward		$43 90
Att'ys' docket fee, De Gray and others	$20 00	
Cost of printing record	28 20	
		48 20
Total		$92 10

A true copy cost bill.
Taxed by—
J. M. McKEE, *Clerk*. [SEAL.]

J. V. Guillotte, United States marshal.

Office of United States marshal, eastern district of Louisiana.

NEW ORLEANS, *Dec.* 7, 1898.

In the Circuit Court of the United States.

WILDER & Co.
vs.
CITY OF NEW ORLEANS. } No. 11380.

The marshal's costs due J. V. Guillotte herein amounts to thirteen and $\frac{50}{100}$ dollars.

$13.50.

(Signed) T. I. GALBRETH,
Deputy U. S. Marshal.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk U. S. circuit court for the eastern district of Louisiana, do hereby certify the foregoing seven and one-half ($7\frac{1}{2}$) pages do contain a true copy of the amended petition, exception and answer, judgment on mandate and judgment of award, and of the taxed cost bills in the case of Wilder & Company *v.* City of New Orleans, No. 11380 of the docket of said court, and to be filed as a supplemental transcript of appeal in the case of John G. Warner *vs.* City of New Orleans, No. 12350 of the docket of the said court, in the honorable U. S. circuit court of appeals for the fifth circuit.

Witness my hand and seal of said court, at the city of New Orleans, State of Louisiana, this 16th day of April, A. D. 1900.

E. R. HUNT, *Clerk*,
[SEAL.] By H. J. CARTER, *Dy Clerk.*

United States Circuit Court of Appeals, Fifth Circuit.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees. } No. 928.

Appeal from the United States circuit court, eastern district of Louisiana.

It is hereby stipulated and agreed that the act of sale of the Mississippi & Mexican Gulf Ship Canal Company and Warner Van Norden to the City of New Orleans, passed before Gustave Le Gardeur, notary public, June 7th, 1876, offered in evidence before the master, and on the trial of the exceptions to the report of the said master in the circuit court, not found in the printed transcript herein, being omitted therefrom by inadvertence, shall be made a part of the transcript of the record of appeal herein; that the said act of sale being already on file in this court, in Record No. 364, pages 125 *et sequitur*, shall not be incorporated in this transcript, but shall be read

and used as found in the said record, to the same effect as though incorporated in the record of this appeal.

RICHARD DE GRAY,
Solicitor for Complainant.
S. L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Defendant.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1899.

MONDAY, *April* 23, 1900.

(Extract from Minutes.)

CITY OF NEW ORLEANS
vs.
JOHN G. WARNER ET ALS.

This cause was regularly called this day and submitted to the court after argument by Mr. B. K. Miller, for the appellant, and by Mr. Richard De Gray and Mr. Jno. D. Rouse, for the appellees.

November Term, 1899.

TUESDAY, *May* 1, 1900.

(Extract from Minutes.)

CITY OF NEW ORLEANS
vs.
JOHN G. WARNER ET ALS.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be and the same is hereby affirmed.

It is further ordered, adjudged and decreed, that the appellant, The City of New Orleans, and the surety on the appeal bond herein, Robert M. Walmsley, be condemned, *in solido*, to pay the costs of this cause in this court for which execution may be issued out of said circuit court.

United States Circuit Court of Appeals, Fifth Circuit.

CITY OF NEW ORLEANS, Appellant,
versus
JOHN G. WARNER ET ALS., Appellees. } No. 928.

Appeal from the United States circuit court, eastern district of Louisiana.

To the honorable the United States circuit court of appeals for the fifth circuit:

The petition of The City of New Orleans, appellant, respectfully prays for a rehearing herein, on the following grounds, to wit:

First. That the court is in error in its finding that all the questions and issues urged by appellant upon its appeal have been decided adversely to the City of New Orleans, and foreclosed against her, by the opinions and decrees of the Supreme Court of the United States in Warner *vs.* New Orleans, 167 U. S., p. 467, and New Orleans *vs.* Warner, 175 U. S., p. 120, and in support of this application respectfully asks the court to consider the original briefs and oral argument made herein on behalf of the city of New Orleans.

Petitioner files herewith, as part hereof, a copy of the assignment of errors, and asks that it be taken and considered as part of this petition, the same as though fully incorporated at length therein.

S. L. GILMORE,
City Attorney.
BRANCH K. MILLER,
Solicitors for Defendant.

Assignment of Errors.

First. That the court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this court on the — day of March, 1900; that the court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second. That from the evidence before the court, accompanying the said report, it exclusively appeared that the dredge-boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the city of New Orleans from Warne, Van Norden and the Mexican Gulf & Ship Canal Company, by authentic act before G. Le Gardeur, Jr., notary public, of date June 7, 1876, were of the value of $153,750 under the appraisement made pursuant to the act of the General Assembly of Louisiana No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the city of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment

of the purchase price of property, and hence not entitled to the benefits of the decree in this cause.

Third. That as to the $20,000 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the city of New Orleans to other than drainage-fund purposes, there was no warrant or authority in law, or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of this court, or of the Supreme Court of the United States, in this cause; that the circuit court erred in admitting them to any participation in the fund ascertained by the master to be due by the city of New Orleans, or to their payment out of the same.

Fourth. That as to the remainder of the $320,000 issued, as shown by the said act of sale from Van Norden and said company to the city of New Orleans, that is, the residue after deducting the said $153,750, the value of the dredge-boat-, etc., and $20,000 in satisfaction of drainage taxes claimed to have been diverted, to wit, $146,250, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the city of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which in any event would be a condition precedent under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees, and to charge therefor at the rate of 50 cents per square yard for each class of work, while the assumption of this work by the city of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750, while, as a matter of fact, the whole amount of the $320,000 of warrants issued by the city *were* decreed to be payable out of the said funds,

save $4,000 thereof, which has been paid, in which finding the court was in error.

Fifth. That warrants to the extent only of $153,750 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterward to have done what there was no right to do.

Sixth. That the court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a *a* unit, in which there was error; that the court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750 ascertained as aforesaid.

Seventh. That the court erred in holding that all questions raised by the exceptions to the master's report were foreclosed or decided adversely to respondent, in the prior decrees in this cause, made and entered by this court and by the Supreme Court of the United States; that the grounds of said exceptions, and the issues raised by the latter, had never been considered by this court or by the Supreme Court of the United States, and hence had not been decided or passed upon at all by either court; that the circuit court erred in so holding, and should have held the reverse.

November Term, 1899.

MAY 9, 1900.

(Extract from Minutes.)

CITY OF NEW ORLEANS
vs.
JOHN G. WARNER ET ALS. } No. 928.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1899.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees. } No. 928.

Appeal from the circuit court of the United States for the eastern district of Louisiana.

(Before Pardee, McCormick, and Shelby, circuit judges.)

By the COURT: All the questions raised on this appeal have been settled adversely to the appellant in the protracted litigation of this case. See Warner *vs.* New Orleans, 167 U. S., 462; Warner *vs.* New Orleans, 59 U. S. App., 131, and New Orleans *vs.* Warner, 175 U. S., 120.

It follows that the decree of the circuit court herein appealed from must be affirmed, and it is so ordered, with costs, but no damages.

United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 91 pages, numbered from (*a*) to 90 inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court in the case of The City of New Orleans *vs.* John G. Warner *et als.*, No. 928, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 9th day of May, A. D. 1900.

[SEAL.] J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Being informed that there is now pending before you a suit in which The City of New Orleans is appellant and Ann Warner, Joanna E. McCrossin, Mary E. Warner, and Harry Warner, sole heirs-at-law to John G. Warner, deceased, *et al.* are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the eastern district of Louisiana, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of June, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Fifth Circuit.

THE CITY OF NEW ORLEANS, Appellant,
vs.
ANN WARNER ET ALS., Appellees. } No. —.

It is hereby stipulated and agreed that the certified copy of the transcript of record of this cause now in the Supreme Court of the United States, filed therein with the petition of the City of New Orleans to the said court for certiorari, and now on file in the office of the Supreme Court of the United States, shall be taken, consid-

ered, and construed as a return to the said writ of certiorari granted by the Supreme Court herein.

(Signed) R. DE GRAY,
" J. D. ROUSE,
" WM. GRANT,
Attorneys for Ann Warner et als.

(Signed) BRANCH K. MILLER,
Attorney for Board of Liquidation of the City Debt.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing one page contains a true and perfect copy of the agreement of counsel filed in the case of The City of New Orleans *vs.* Ann Warner *et als.*, as fully and completely as the same now remains of record and on file in my office.

[SEAL.] In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 7th day of July, A. D. 1900.

J. M. McKEE,
Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

Received the within writ July 5th, 1900.

For return to within writ, I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, by direction of the judges of said court, do herewith annex and make a part of this return a certified copy of the agreement of counsel filed in my office, and do certify that the transcript of the record of the cause stated in the within writ now on file in the office of the clerk of the Supreme Court of the United States is a true, full, and perfect transcript of the record and all proceedings had in said cause in the United States circuit court of appeals for the fifth circuit, as the same now remains of record and on file in my office.

[SEAL.] Given under my hand and seal of said court hereto affixed, at the city of New Orleans, this July 7th, A. D. 1900.

J. M. McKEE,
Clerk of the U. S. Circuit Court of Appeals, Fifth Circuit.

Endorsed: File No., 17763. Supreme Court of the United States. No. 281. October term, 1900. The City of New Orleans *vs.* Ann Warner *et al.*, heirs, &c., *et al.* Writ of certiorari and return. Filed July 10, 1900.

Supreme Court of the United States, October Term, 1900.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER ET ALS., Appellees. } No. —.

It is stipulated between the parties in this case that only the following portions of the record of the former appeal, No. 172 of the October term of 1899, and of the supplemental record of the pro-

ceedings since had in the cause filed under the No. 281 of the October term, 1900, need be printed for the purposes of this appeal:

1st. The original bill of John G. Warner, to be found in the original printed record, No. 172 of the October term of 1899 of the Supreme Court, beginning at p. 1, and amendment to the bill, at p. 185; but all exhibits to the bill are to be omitted.

2nd. The answer of The City of New Orleans to said bill in said original record, No. 172, beginning p. 186.

3rd. The agreement dated June 7th, 1876, for sale of dredge-boats, &c., in said original record, beginning at p. 97.

4th. Ordinance No. 3479, in said record at p. 104.

5th. " 3539, " " "

6th. Appraisements of T. S. Hardee, beginning at p. 91 of said record.

7th. Specimen copy of one of the drainage warrants, in said record at p. 109.

8th. Petition of City of New Orleans for writ of certiorari, filed in United States Supreme Court in said No. 172 to review said decree, together with the assignment of errors filed at the hearing.

9th. The opinion and decree of the court of appeals on the last appeal.

10th. The petition of the City of New Orleans for a writ of certiorari in this case and answer thereto of the appellees, and transcript of record of appeal to circuit court of appeals filed therewith.

It is further agreed that either party may refer to and use in the trial of the present appeal any part of said original or supplemental records with like effect as if the same had been reprinted and incorporated in the portions printed under this stipulation.

It is further agreed that any party may at any time before the *the* cause is decided have printed for the use of the court any other portions of the record that may be desired by him.

New Orleans, La., Oct. 9, 1900.

RICHARD DE GRAY,
J. D. ROUSE,
WM. GRANT,
Attorneys for Appellees.
BRANCH K. MILLER,
Solicitor for City of New Orleans.

Endorsed: File No., 17,763. Supreme Court U. S., October term, 1900. Term No., 281. The City of New Orleans, petitioner, *vs.* Ann Warner *et al.*, heirs-at-law, &c., *et al.* Stipulation as to printing record. Filed October 12, 1900.

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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 640 281

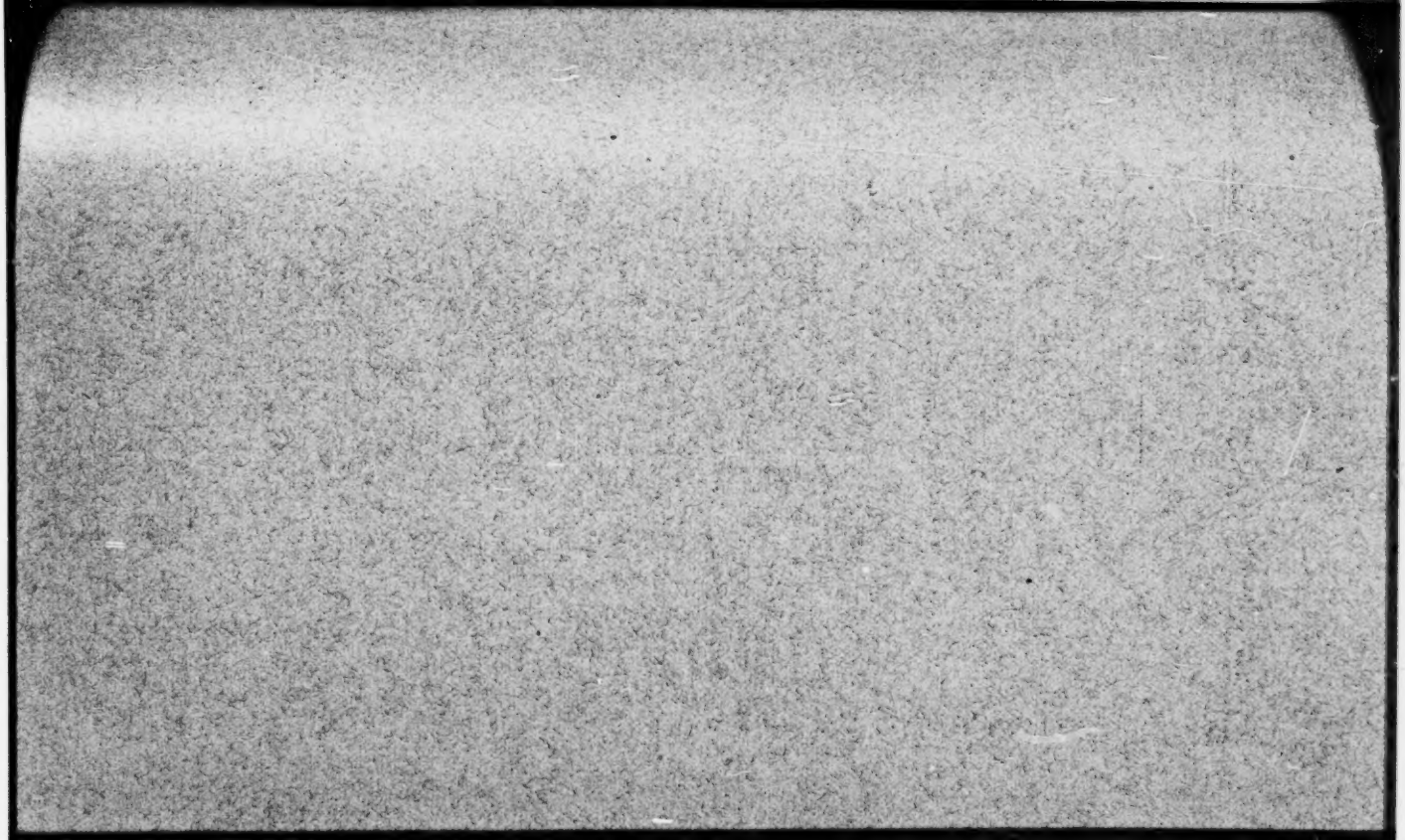
THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

versus

JOHN G. WARNER, JOHN CROSSLEY'S SONS, THE SUFFOLK NATIONAL BANK, FRANCIS JAMES GASQUET, WILDER & COMPANY, MRS. FRANK N. BUTLER, IN HER INDIVIDUAL CAPACITY AS WIDOW IN COMMUNITY, AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FRANK N. BUTLER, HER DECEASED HUSBAND, MRS. MARY E. TALIAFERO, AND MRS. ELIZA J. LYTLE, DATIVE TUTRIX, RESPONDENTS.

Petition for writ of certiorari, requiring the United States Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of City of New Orleans, Appellant, vs. John G. Warner, et als., Appellees, No. 928 November Term, 1899.

A. W. HYATT STAT'Y MFG. CO., LTD., N. O.—83,834.



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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. ———

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

versus

JOHN G. WARNER, JOHN CROSSLEY'S SONS, THE SUFFOLK NATIONAL BANK, FRANCIS JAMES GASQUET, WILDER & COMPANY, MRS. FRANK N. BUTLER, IN HER INDIVIDUAL CAPACITY AS WIDOW IN COMMUNITY, AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FRANK N. BUTLER, HER DECEASED HUSBAND, MRS. MARY E. TALIAFERO, AND MRS. ELIZA J. LYTLE, DATIVE TUTRIX, RESPONDENTS.

Petition for writ of certiorari, requiring the United States Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of City of New Orleans, Appellant, vs. John G. Warner, et als., Appellees, No. 928 November Term, 1899.

To the Honorable the Supreme Court of the United States:

The petition of the City of New Orleans, a municipal corporation, created by the act of the General Assembly of the State of Louisiana No. 45 of its session in 1896, respectfully shows:

That complainant, Warner, on November 26, 1894, filed his bill in the Circuit Court, setting forth in substance that he was the holder and owner of three warrants on the City of New Orleans, issued under a certain contract made June 6, 1876, for the purchase from the Mississippi and Mexican Gulf Ship Canal Company, and Van Norden, its transferree, of its rights, franchises, tools, implements, machines, boats and apparatus, the price whereof was to be paid in drainage warrants, payable out of drainage taxes, imposed under various acts of the Legislature set out in the bill; that the price of the sale was three hundred thousand dollars in such warrants. The bill further set up that the said contract of purchase was made under authority of Act No. 16 of the General Assembly, of Louisiana, approved March 24, 1876, and that by the contract thereunder the City of New Orleans was to complete the system of drainage which had then been partially constructed by the said company and Van Norden, and to collect the drainage taxes which had been imposed to provide for the expense of establishing the system; that the City of New Orleans, from the date of its said purchase, ceased to do all work on said system, and never, thereafter, commenced or prosecuted any other, but sold some of the boats and machinery so purchased, diverted the proceeds of the drainage taxes to unauthorized purposes, and allowed others of the said boats to rot and sink, unused.

After charging other acts in violation of the city's contract of 1876, the bill concluded with a prayer for the taking of an account of all drainage taxes, assessments and judgments, imposed under certain named statutes, and of all moneys collected by the city on account of the same, as well as all payments, disbursements and dispositions thereof; for all loss, waste and damage caused by the city to the said assessments and judgments, by reason of her illegal and wrongful acts in violation of the duties and obligations imposed on her by said act of sale of June 6, 1876; and that the sum found to be due on said accounting, with interest, be decreed to be paid over to plaintiff, and other parties similarly situated, to the full extent of their warrants, with interest, and other germane relief.

To this bill the city filed a demurrer, general and special, under which it was claimed that she was entitled to plead, against any asserted liability on account of the warrants sued on, her issue in 1873 of $1,672,105.21 of bonds, to retire that amount of drainage warrants, on the ground that, that, if not a

discharge of any and all liability by her to the drainage fund, was at least a payment of any sum for which she, herself, might be a debtor to that fund, on account of drainage assessments against streets, squares, public places, and other property of a like character; also that the decision of the Supreme Court, in the case of James W. Peake vs. City of New Orleans, 139 U. S., p. 342, was *res adjudicata* against complainant, as to all the matters and things set out in his bill.

The demurrer was sustained by the Circuit Court, and the cause being brought to the Court of Appeals for the Fifth Circuit, by appeal, it was by that Court certified to the Supreme Court of the United States, to obtain its instructions as to the two points relied upon by the city, as above stated.

Warner vs. City of New Orleans, 167 U. S., 467, *et seq.*

The Supreme Court held, that the city could not plead her bond issue as a setoff or payment, as to any liability sought to be established by the bill; the second question it declined to answer.

See Warner vs. New Orleans, 167 U. S., 467, *et seq.*

Thereupon, after the filing of the mandate of the Supreme Court, the Court of Appeals overruled the demurrer, on the ground, besides that furnished by the Supreme Court's opinion, that the case of Peake vs. New Orleans did not necessarily apply to the facts of this case, nor operate to defeat complainant's action.

See Warner vs. New Orleans, 81 Fed. Rep., 645.

The city having filed its answer in the Circuit Court, after the taking of evidence, the cause came on for a hearing, which resulted in a decree of the Circuit Court, dismissing the bill; from this decree an appeal was taken to the Court of Appeals, by which it was reversed and one entered in favor of complainant; the case was then carried by *certiorari* to the Supreme Court of the United States, which affirmed the judgment of the Court of Appeals.

See Warner vs. New Orleans, 175 U. S., 120.

Thereupon there was a reference to a special master, for the purpose of ascertaining the amount of drainage funds for which the city was liable under the last decree, and also what other persons, besides complainant, as holders of drainage warrants, were entitled to the benefits of the decree; the master reported that the city was liable for an amount somewhat in excess of two millions of dollars of drainage taxes, composed, in

part, of assessments levied against private property, which she failed to collect, and also in part of drainage assessments levied against streets, public squares, public places, etc., of which she was found the debtor.

The master also reported that the following parties, holders of drainage warrants, of the same class and kind as those held by relator, should, in common with him, be paid the amounts represented by their said warrants, to-wit:

1st.—John Crossley & Son, 58 warrants, aggregating	$149,000 00
2nd.—Wilder & Co., 2 warrants, in judgment, aggregating	7,000 00
3rd.—F. J. Gasquet, 6 warrants, aggregating	30,000 00
4th.—The Suffolk National Bank, of Boston, 6 warrants, aggregating	60,000 00
5th.—Frank N. Butler and Mary E. Taliafero, 1 warrant, for	5,000 00
6th.—John J. Donaldson, 1 warrant, for	2,000 00
7th.—Mrs. Eliza J. Lyttle, dative tutrix, 3 warrants, for	12,000 00

Said sums to bear interest at 8 per cent. per annum from June 7, 1876.

To this report defendant filed the following exceptions:

First.—That there was error in charging defendant with liability for the whole of the uncollected assessments against private property, of property owned by private persons, because the evidence before master showed that all such taxes as could be, or were susceptible of collection, have been collected and paid over to the parties and purposes for which they were assessed.

Second.—That the advantages of the decree under which the reference is made, extended only to such warrants as were issued in payment of the property purchased by the act before G. LeGardeur, notary public, of date June 7, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750, and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the Circuit Court of Appeals and of the Supreme Court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the

Mississippi and Mexicana Gulf Ship Canal Company and Warner Van Norden against the City of New Orleans; that of of said warrants, besides those issued in settlement of said claim for damages, the sum of twenty thousand dollars was issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the City of New Orleans, prior to June 6, 1876, and applied to general fund purposes, and hence, that as to those warrants, in any event, there could be no recovery or allowanace made; that in any event, the decree in the suit of J. W. Peake vs. City of New Orleans, No. 11,614, of the United States Circuit Court for the Eastern District of Louisiana, is *res judicata*,, in favor of this defendant.

That although there is no mark or sign upon any of the said warrants, which were issued in payment of the price of the property purchased, which were given in settlement of the claim for damages, and which were executed and delievered in payment for drainage work, which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payment of the price of the said property, and what were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution; first, for the payment of the price of the property purchased; next, to the settlement of the claim for damages, and lastly for the payment for work mentioned in said notarial act; that all of said warrants bear date June 6, 1876, the first one bearing the number 313, and run up to and inclusive of the number 402, as is shown by the statement of the said warrants themselves, offered in evidence.

That from an examination of the said warrants, and a comparison of their numbers, it will be seen that with the issuance of warrant No. 332 there had been reached an issue of $150,000, adding to which warrant 333 for $5,000, would make a total issue of $155,000, or a difference of $1,250 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

After hearing, these exceptions were overruled and a final decree entered, declaring the city a debtor to the drainage fund in the sum of $1,850,336.52, this being the amount, with interest, of the assessments against public property alone, no note being taken in the decree of the amount for which the master's

report had found a liability for the assessments on private property; drainage warrants held by complainant, and other intervening warrant holders, to the extent of $271,000, with interest thereon at 6 per cent, per annum, from June 6, 1876, amounting in all to about $791,000, were decreed to be payable out of the fund so established.

From this decree the city took an appeal to the Court of Appeals.

The assignment of errors for said appeal, sets up the same grounds appearing in the exceptions to the master's report.

The first one sets out that the Court erred in overruling, and refusing to sustain the exceptions; that the same should have been maintained, and that there should have been a decree in favor of respondent; the other six assignments, set out in detail, the specific errors in the Court's finding, and the special grounds relied upon for a reversal.

That on April 30th, 1900, the said Court of Appeals, for the Fifth Circuit, entered a decree, affirming that of the Circuit Court, for the reasons that all the issues raised in the Circuit Court, and upon the appeal from its decree, had been decided and foreclosed against the City of New Orleans by the Supreme Court of the United States, by its decree in Warner vs. City of New Orleans, 167 U. S., p. 467, and City of New Orleans vs. Warner, 175 U. S., p. 120.

That in the said Circuit Court, at the same time that petitioner applied for and obtained its order of appeal, it filed, in connection with its motion therefore, the following assignment of errors:

First.—That the Court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this Court on the —— day of March, 1900; that the Court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second.—That from the evidence before the Court, accompanying the said report, it conclusively appeared that the dredge boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the City of New Orleans from Warner Van Norden and the Mexican Gulf and Ship Canal Company, by authentic act before G. LeGardeur, Jr., notary public, of date June 7th, 1876, were of the value of

$153,750.00, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the City of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third.—That as to the $20,000.00 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the City of New Orleans to other than drainage fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of the Court of Appeals, or of the Supreme Court of the United States, in this cause, that the Circuit Court erred in admitting them to any participation in the fund ascertained by the master to be due by the City of New Orleans, or to their payment out of the same.

Fourth.—That as to the remainder of the $320,000.00 issued, as shown by the said act of sale from Van Norden and said company to the City of New Orleans, that is, the residue after deducting the said $153,750.00, the value of the dredge boats, etc., and $20,000.00, in satisfaction of drainage taxes claimed to have been diverted, to-wit: $146,250.00, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the City of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants

may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work, by the City of New Orleans, required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the Court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750.00, while, as a matter of fact, the whole amount of the $320,000.00 of warrants issued by the city were decreed to be payable out of the said funds, save $4,000.00 thereof, which has been paid, in which finding the Court was in error.

Fifth.—That warrants to the extent only of $153,750.00 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth.—That the Court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a unit, in which there was error; that the Court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750.00, ascertained as aforesaid.

Seventh.—That the Court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decrees of this cause, made and entered by this Court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been con-

sidered by this Court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either Court; that the Circuit Court erred in so holding, and should have held the reverse.

That petitioner also incorporated the said assignments of error in its application for a rehearing made herein to the said Circuit Court of Appeals.

That in the opinion and decree of the said Circuit Court of Appeals there was error to the prejudice of petitioner in the following particulars, to-wit:

First.—That the grounds of exception to the master's report filed by petitioner in the Circuit Court, and the issues raised by such exceptions, had not been decided adversely to the City of New Orleans, or foreclosed against her, in Warner vs. New Orleans, 167 U. S., p. 467, and New Orleans vs. Warner, 175 U. S., p. 120; and that the Court of Appeals erred in holding the reverse that, on the contrary, no such questions were raised, much less decided, in the case first mentioned, and that in the cause secondly mentioned, although some of the issues presented by said exceptions were urged upon the Court, the latter, by its opinion, expressly declined to consider them; and, further, the precise issues presented herein were not made, much less passed upon, by the Supreme Court, in the case secondly mentioned.

Second.—That the principle declared by the two said cases was that the drainage warrants in question here, so far as issued in payment of the price of property, were obligations of the City of New Orleans; that the Supreme Court did not decide, in either of said cases, that warrants issued in settlement of, or attributable to, the payment of any claim for damages held by the Mississippi and Mexican Gulf Ship Canal Company or Warner Van Norden against the City of New Orleans, were obligations of the latter, or entitled to the same rights and privileges as warrants issued in payment of the price of property; that the Court of Appeals for the Fifth Circuit erred in not so holding, and also in holding as it did.

Third.—That no warrants should be considered as having been issued in payment of the price of the franchise of the said company, as the same was of no value to the City of New Orleans, and its acquisition by the latter gave it nothing of any value, but was, on the contrary, the assumption by it of an onerous burden, to-wit: the completion of the drainage work at

its own expense, for which work the company and Van Norden were entitled to charge fifty cents per square yard for canal excavation and levee building, which charges, however, they had never been able to collect, except in an insignificant amount, thus throwing upon the company and Van Norden the loss of many hundreds of thousands of dollars; thus relieving them of a burdensome and unprofitable duty, and the Court of Appeals erred in holding that the contrary held by the Supreme Court, as that the said franchise was to be considered, as in part, a consideration for any of said warrants.

Fourth.—That the item of twenty thousand dollars of drainage warrants, issued in settlement of the amount of drainage taxes said to have been diverted or used by the City of New Orleans for purposes other than the retirement of drainage warrants, prior to June 7th, 1876, the date of the city's purchase, was in reality entirely beyond the authority given the city by Act No. 16 of 1876, and the substitution of so many so called "purchase" warrants for a corresponding amount of warrants issued to Van Norden and the said company, in payment for work done, which latter class of warrants it was decreed that the city could not be compelled to pay, in the case of J. W. Peake vs. City of New Orleans, No. — of the docket of this Court of its October term of 1890.

Fifth.—That the said Court erred in not sustaining the assignment of errors upon which the reversal of the decree of the Circuit Court was asked, which said assignment of errors was as follows, to-wit:

First.—That the Court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this Court on the — day of Mrch, 1900; that the Court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second.—That from the evidence before the Court, accompanying the said report, it conclusively appeared that the dredge boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the City of New Orleans from Warner Van Norden and the Mexican Gulf and Ship Canal Company, by authentic act before G. LeGardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750.00, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that

to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the City of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment of, or participation in, the said fund, because they were in no sense "purchase" warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third.—That as to the $20,000.00 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the City of New Orleans to other than drainage fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of this Court, or of the Supreme Court of the United States, in this cause; that the Circuit Court erred in admitting them to any participation in the fund ascertained by the master to be due by the City of New Orleans, or to their payment out of the same.

Fourth.—That as to the remainder of the $320,000.00 issued, as shown by the said act of sale from Van Norden and said company to the City of New Orleans, that is, the residue after deducting the said $153,750.00, the value of the dredge boats, etc., and $20,000.00, in satisfaction of drainage taxes claimed to have been diverted, to-wit: $146,250.00, they were issued without any warrant or authority of law, the said Act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the City of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by

respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work by the City of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that, in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the Court should have refused the allowonce of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750.00, while, as a matter of fact, the whole amount of the $320,000.00 of warrants issued by the city were decreed to be payable out of the said funds, save $4,000.00 thereof, which had been paid, in which finding the Court was in error.

Fifth.—That warrants to the extent only of $153,750.00 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth.—That the Court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a unit, in which there was error; that the Court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750.00, ascertained as aforesaid.

Seventh.—That the Court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decrees in this cause, made and entered by this Court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been considered by his Court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either Court; that the Circuit Court erred in so holding, and should have held the reverse.

26133

Your petitioner thus respectfully submits that the questions involved in the determination of the controversy in this suit, are of such gravity and importance, and their treatment by the Court of Appeals was such, as justifies petitioner, in the furtherance of justice, to invoke the power of this Court, that they may be authoritatively and finally adjudged upon, after a full presentation of the merits.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said Circuit Court of Appeals, in said case, therein entitled City of New Orleans vs. John G. Warner, *et als.*, No. 928, to the end that said case may be reviewed and determined by this Court, as provided by Section 6 of the Act of Congress entitled, "An act to establish Circuit Courts of Appeals, and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes," approved March 3rd, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said decree of the said Circuit Court of Appeals in said suit, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

United States of America,
State of Louisiana,
City of New Orleans.

Paul Capdievielle, being duly sworn, deposes and says: That he is the Mayor of the City of New Orleans, plaintiff in the suit of City of New Orleans vs. John G. Warner, *et als.*, No. 928 of the docket of the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the foregoing petition, and the facts therein stated are true to the best of his knowledge and belief.

United States of America,
State of Louisiana,
City of New Orleans.

Samuel L. Gilmore, being duly sworn, deposes and says: That he is City Attorney of the City of New Orleans; that as such he had personal charge for the said city of the case in the foregoing petition mentioned, in the United States Circuit Court of Appeals, for the Fifth Circuit; that he has read the said petition, by him subscribed, and the facts therein stated are true, to the best of his knowledge and belief.

Office Supreme Court, U.S.
FILED
MAY 14 1900
JAMES H. McKENNEY,

Fo. 649. 281

By. of Filmore & Miller for

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 649

Filed May 14, 1900.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

vs.

ANN WARNER, JOANNA McCROSSIN, MARY E. WARNER AND HARRY WARNER, LEGAL HEIRS OF JOHN G. WARNER; JOHN CROSSLEY'S SONS, THE SUFFOLK NATIONAL BANK, FRANCIS JAMES GASQUET, WILDER & COMPANY; MRS. FRANK N. BUTLER, IN HER INDIVIDUAL CAPACITY AS WIDOW IN COMMUNITY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FRANK N. BUTLER, HER DECEASED HUSBAND; MRS. MARY E. TALIAFERO, JOHN J. DONALDSON, AND MRS. ELIZA J. LYTLE, DATIVE TUTRIX, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SAMUEL L. GILMORE,
City Attorney.

BRANCH K. MILLER,
Solicitors for Petitioner.

May, 1900.

26136

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ———

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

versus

ANN WARNER, JOANNA McCROSSIN, MARY E. WARNER AND HARRY WARNER, LEGAL HEIRS OF JOHN G. WARNER; JOHN CROSSLEY'S SONS, THE SUFFOLK NATIONAL BANK, FRANCIS JAMES GASQUET, WILDER & COMPANY; MRS. FRANK N. BUTLER, IN HER INDIVIDUAL CAPACITY AS WIDOW IN COMMUNITY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FRANK N. BUTLER, HER DECEASED HUSBAND; MRS. MARY E. TALIAFERO, JOHN J. DONALDSON, AND MRS. ELIZA J. LYTLE, DATIVE TUTRIX, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The various assignments of error relied upon by petitioner present, in varying forms, the following propositions:

First—That Act No. 16 of 1876 authorized the issuance of drainage warrants for two purposes alone, namely:

The purchase of (a), the corporate franchises of the Mississippi & Mexican Gulf Ship Canal Company from the latter, and its transferee, and (b), the dredge boats, derricks, etc., which had been used by them in prosecuting the work of drainage.

Second—That it was for these purposes only, except as to an amount of twenty thousand dollars, that drainage warrants were issued, under the contract of sale which was made under the authority of this statute.

Third—There was no authority given by the Act of 1876 to issue any warrants in compromise or settlement of the claim for damages, exploited by the company and its transferee, against the City of New Orleans.

Fourth—That the company's franchise, considered as a thing of value to the city, for which any warrants were or may have been issued, must be regarded as a fiction, and its acceptance by the city was the assumption of an onerous burden, and in no real sense the acquisition of property; that on this account it should not be weighed as part of the consideration of any warrants issued; that in any event it could form no part of the contract, because there was an entire omission to observe the condition precedent for a valid contract, prescribed by Sec. 2 of the Act of 1876, to the effect that there should be a previous appraisement of the rights and things which the city was to purchase or settle for, should she deem it advisable to make any contract under the statute.

Fifth—That twenty thousand dollars of the warrants actually issued under the contract of purchase, to reimburse, by way of compromise, an amount of drainage taxes collected prior to 1876, and diverted by the city to purposes other than the payment of drainage warrants, were issued without any authority of law, and hence should not be admitted on the same footing as warrants issued in payment of the price paid for the purchase of property to

which class of warrants alone the benefits of the previous decrees of this court in the present case extend.

Sixth—That none of the questions raised by petitioner in the Circuit Court and in the Court of Appeals for the Fifth Circuit, have ever been decided adversely to petitioner in this court, nor, in fact, decided at all.

The above statement sets out the logical order in which the points insisted upon by petitioner, arise, and having thus briefly brought them to the notice of the court, it is deemed best to consider, first, whether or not this court has already considered and refused to maintain them; this brings us to the first ground assigned as error in the decree in the Court of Appeals, which is the following:

First—That the grounds of exception to the master's report filed by petitioner in the Circuit Court, and the issues raised by such exceptions, had not been decided adversely to the city of New Orleans, or foreclosed against her, in Warner vs. New Orleans, 167 U. S., p. 467, and New Orleans vs. Warner, 175 U. S., p. 120, and that the Court of Appeals erred in holding the reverse: that, on the contrary, no such questions were raised, much less decided, in the case first mentioned, and that in the cause secondly mentioned, although some of the issues presented by said exceptions, were urged upon the Court, the latter, by its opinion, expressly declined to consider them; and, further, the precise issues presented herein were not made, much less passed upon, by the Supreme Court, in the case secondly mentioned.

The question here raised, namely, whether or not any decree can be entered against the city for more than $153,750, the appraisement of the dredge boats, has never been passed upon by this Court, or Court of Appeals; on the contrary, the opinion of the former in 167 U. S., pp. 467 et seq., in answer to a certified question, and that found in 175 U. S. 120, upon the certiorari obtained by the city, both distinctly negative the contention that on

either occasion anything was said, which declared that *all* warrants issued under the contract of 1876, stood upon the same footing as the particular warrants held by complainant; the first opinion contained many *dicta* which show that the Court, in speaking, had distinctly in view the contract of 1876 only as a *sale of property*, and in no part a *settlement of a claim for damages;* the opinion secondly mentioned, distinctly declines to enter upon any inquiry to ascertain, whether there was any difference between the amount of warrants issued as the price of the tangible property, and those issued in settlement of the claim for damages.

The case in 167 U. S. consists of the Court's answer to one of two certified questions, the second of which it declined to answer. It will be seen from the opinion, that the Court declined to consider the case outside of the certificate of the Court of Appeals, stating the facts as to which instructions were sought; your Honors declined to consider the whole case presented by the record, but confined your examination to the distinct questions of law certified. (See pp. 474, 475.)

The statement of the Court of Appeals, upon which the questions were certified, set forth the facts upon which the Supreme Court's opinion was sought; that Court confined itself to the facts appearing in the statement, and paid no regard to any others, for it says, (p. 475), "for these facts we look simply to the statement prepared by the Court of Appeals, and not to the bill and exhibits, copies of which it ordered to be sent to this Court."

The statement of the Court of Appeals touching the act of 1876, is as follows: It "was passed for the purpose of authorizing the city of New Orleans to assume exclusive control of all drainage work, and if she desired it, or deemed it advisable, to *purchase* from said Canal Company and the transferee Van Norden, *all the tools, boats, and apparatus pertaining to drainage work, and the fran-*

chise of the company, upon an appraisement to be made by appraiser, sto be appointed by the City Council.

"The act further provided, that the *price* should be paid by the city of New Orleans in drainage warrants, in the same form and manner as those theretofore issued under Act 30 of 1871," p. 470.

Having thus described what was authorized by the act, the statement of the Court of Appeals then sets out the contract made under it, which it described in these words; (p. 470): "The valuation was fixed at $300,000, and on the 7th of June, 1876, *a formal act of sale and transfer* was executed between Warner Van Norden and the city of New Orleans, by which the former made a *transfer* of the drainage plant and franchise for said amount" (p. 470).

The warrants which were the subject matter of the suit are adverted to in the following language:

"Complainant sues on three of the drainage warrants of two thousand dollars each, given for the *purchase price of the drainage plant and franchise sold* to the city of New Orleans, as above set forth," p. 471.

Again, an page 471, in setting out an abbreviated statement of the averments of the bill the Court of Appeals declares, "That the city had never claimed, prior to the *purchase of said property and franchise*, that the issuance of the said bonds, etc. * * * And again, that "the Act of 1876 was an authority for the city to make said *purchase* as well as a legislative recognition," etc.; * * * again on page 472, "(6) that the contract of *sale* was entered into by Van Norden in consideration of the provisions of said act of 1876, and its effects on his rights and remedies; that neither at the time of entering into the *contract of sale*, nor when the warrants were delivered in discharge," etc. (p. 472).

And again in the statement of the first question propounded, the only one which this Court answered,

the contract of June 7, 1876, is declared to be a *sale*, and not a *transaction or compromise*, to-wit:

"First—Is the city of New Orleans, under the warranty, express and implied, contained in the *contract of sale* of June 7, 1876, by which she *acquired* the property and franchise from Warner Van Norden," etc.; p. 473.

Turning to the opinion itself, it is clear that this Court had in mind, as the foundation of the superiority awarded the "purchase" warrants, over the "work" warrants, the scope of the act of 1876, as to which the following is affirmed; (See bottom p. 475):

"An act was passed authorizing the city of New Orleans to assume exclusive control of the drainage work, and, if it desired, to *purchase* from the canal company and its transferee all the boats, tools, and apparatus pertaining to the work, and also the franchise of the company."

And on page 476, the Court says: "The city elected to make the *purchase of the property* of the canal company and its transferee."

And again, on the same page: "Now, after the city had assumed exclusive control of the work, after it had voluntarily *purchased from the canal company and its transferee, their property*, and had given these warrants, payable out of the drainage fund, it sold some of the drainage machinery, suffered the rest to become rotten and valueless, and abandoned the work of drainage."

On page 477, "the city, in respect of the *purchase of this property* from the canal company and its transferee, and in the obligations assumed by the warrants issued, acted voluntarily."

* * * * * *

"The proposition we affirm is, that *one who purchases property*, contracting to pay for it out of a particular fund, and issues warrants therefore, payable out of that fund * * * * * *

can not deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead, in defense to a liability on the warrants drawn on that fund, that it had, prior to the *purchase*, paid off obligations theretofore created against the fund."

This is followed by language which again speaks of the contract as a *purchase*, and the property as that which the city "voluntarily purchased."

So far as the thoughts in the Court's mind, which it purposed to express in its opinion, may be ascertained from the language used, there is overwhelming evidence that all that it affirmed, was exclusively confined and had sole reference to the contract, considered as one of purchase, and that it was in no respect regarded as a settlement, transaction or compromise of claims or demands for violation of the contract of 1871 by the city; it appears conclusively, not only that the legislative contract resulting from Act No. 30 of 1871 was not in the slightest degree in contemplation, but no single part of it; still less any right to, or action for, damages consequent to or grow-out of its violation; this is true not only as regards the opinion of this Court, but also the facts stated in the certificate of the Court of Appeals, from which arose the questions of law submitted, and in the first question itself, thoughout both of which, the contract concerned was declared to be one of the sale of property.

Therefore, to attribute either the Court of Appeals, in seeking the instructions of this Court, or to the latter, in giving the instructions asked for, any intention to place warrants issued in settlement of a claim for damages any footing of superiority, is to ascribe to both a purpose which is denied by everything which has been said by either; they meant to do nothing more than to declare, that so far as the contract of 1876 was a sale of property, the price thereof was sacred, and beyond assault in the mode

there attempted by the city; to charge them with having declared that the settlement of the damages claimed was of equal sanctity, is to put into their mouths what they have never spoken; and the relative dignity of the two claims, that for the price of property sold and delivered, and that for damages, are separated by so wide a difference as to make it impossible that the two should be placed upon the same footing; as to the property, the city had received value, and she was not permitted to destroy the consideration she undertook to give for it; in regard to the claim for damages, she had received nothing, and it was a mere claim for supposed indemnity, to which the Act of 1876 added nothing, and on account of which, she had received nothing which she did not have before.

In the case found in 175 U. S., it was argued on pages 1 to 3, inclusive, of petitioner's brief here, that the franchises were of no value, and in their acquisition the city got possession of no real asset, as in the case of boats, but in reality undertook a burden and assumed an obligation, for which it received no consideration; that the possession of the franchise only enabled it to do at an expense to itself, the work which the company, under the act of 1871, had the exclusive right to do, and for which it was entitled to charge fifty cents per square yard for canal digging, and fifty cents per square yard for levee building; this work, for which the company was to receive so high a compensation, the city was to do with its own funds or out of the drainage tax collections, which had never then, and have not now been made, which besides were to be used in paying off the warrants; the inequality and unfairness of the contract were pressed upon the court, and its attention directed to the fact that the claim for damages did not enter into the total sum of $300,000, since the act of sale made no mention of it as part of the consideration, and it may be here added there had been no appraisement of it, although Section 2 of the act of 1876 directed that

the contract be preceded by an appraisement of everything that was to be embraced in the agreement.

But the Court did not pass upon this phase of the matter; on the contrary, it expressly declined to give it consideration, as will appear in the sixth paragraph or section of its opinion, in the following language:

"It is scarcely necessary to say, that the fact that the city chose to pay $300,000 in 1876, for property which Van Norden bought in 1872 from the ship canal company for $50,000, is not one which can be considered here." (157 U. S. 145.)

A more positive statement that the Court not only would decide nothing as to the issue, but further, that it would give it no consideration at all, could not be expressed in language; therefore it is to no purpose that we are told that the contention now made has been passed upon adversely to the city. It has not been passed upon at all; so far as concerns any adjudication upon it, it stands now as it did before this argument was made in this Court when the case was last before it.

After thus declining to consider the question at all, and in so doing it can not be deemed that the Court designed deciding that it was either unfounded or unsustainable, the Court proceeds to declare that the appraisement of the boats and machinery was only $153,750, and that no appraisement at all was made of the damages; but that it must be borne in mind that the consideration of $300,000 was fixed, to cover not only the property, but the exclusive franchise under the act of 1871, and the claims for damages against the city; but it was evidently not intended to decide the question which the Court was at pains in unmistakable language, to declare that it would not consider.

These remarks, however, are only preliminary to the only dictum it intended to pronounce—namely, that the motives of the council in making the contract, could not be inquired into, nor could it be shown that they acted

upon improper consideration; it may be said that the Court did decide this, but it is not only not the question which is here raised, but is not even akin to it in any aspect; the city is not here seeking to show that the contract was dishonest, or that the officials in making it were corrupted; so far from attacking the contract on these lines, the city relies upon its terms to show, that apart from the motive of any person concerned in it, it was in excess of the legislative authority under which it was made, that this appears upon its face, and to the extent to which it exceeds the power given the city by the act of 1876, it must be restrained; again, it is evident that this Court, in its decision in 167, U. S., and the Court of Appeals, have so considered the contract and deal with it, as one for the sale of the dredge boats and machinery alone, and it is only in this aspect that the warrant issueds under it, are entitled to the benefits of the decree rendered in this case.

It would seem strange, indeed, if, every time these two Courts had occasion to mention the contract, it is described as one for the sale of property, and that it is never spoken of as anything else, if as a matter of fact, it was not only this, but also a transaction, compromise and settlement of a claim for damages, about which the parties were not in agreement, of which the city surveyor made no appraisement, as was required by the act of 1876, as a condition precedent, and the validity and extent of which claim, was evidently in dispute between the parties.

It will be noted, that throughout the last decision of this Court, the contract, whenever spoken of, is styled a *purchase;* in the first paragraph or section of the opinion it is said, 175 U. S., p. 129, that in respect to the *purchase*, the city acted voluntarily; that it *paid for the property* in warrants drawn upon a particular fund; that this latter it could not prevent being made good, and then require the *vendor* to look to the fund, and not to itself; in speaking

of Jackson's warrants, in the second section, it said that they "were part of those given in payment of the *purchase price* of the drainage plant," p. 132; also, that complainant based his suit upon $6000 of warrants given for the *purchase of the drainage plant*, p. 133; that in reference to these warrants, it had been held, in 167 U. S., that the city could not, when *purchasing property*, and contracting to pay for it out of a particular fund, abandon its duty, take steps to prevent the further creation of the fund, and plead, in defense to a liability on the warrants, that it had, prior to the *purchase*, paid off obligations created against the fund, p. 134; in the third paragraph it is said, that from the date of the *purchase*, the city ceased all work, and sold some of the boats and machinery *purchased*, etc., p. 134; the third paragraph also quotes from 167 U. S., the language that one who *purchases property*, etc.; again, that prior to the *purchase* of the Ship Canal Company's plant from Van Norden, etc,; also, when the city *purchased* the drainage plant, it seems to have been in good condition, etc.

The decree in this case in favor of Warner, is not a decree in favor of any other holder of warrants; this is assumed by the order of reference, which directs a master to give notice to all other holders of warrants to appear before him and establish their claims (see record, sent up from the Court below, p. 3); the establishment of the claims necessarily involves an inquiry into their status; the defendant can oppose their allowance upon any available ground, based upon either law or fact; their right to share in the fund is open to contest.

The drainage fund, by the second paragraph of the decree, is declared to be a trust fund for the purpose of paying the claims of complainant and other holders of the same class of warrants, issued under the act of sale from Van Norden to the city, under the authority of Act 16 of 1876; that Warner's warrants are entitled to be paid out of

this fund is now beyond question, but the same right, as sought to be availed of by intervenors, is open to question; their warrants may be shown not to be warrants entitled to payment, either under the statute or under the act of sale.

The decisions in this case, in 167 U. S. and 175 U. S., were made only with reference to the three warrants held by Warner; the others were not before the court, and hence whether or not they were entitled to the benefits of the decree was to be determined by subsequent proceedings before the Master.

The decree in favor of Warner, is not a decree to which all of the parties appearing to prove their claims before the Master, simply on the production of warrants of the same class of those upon which the defendant has been decreed to be Warner's debtor, are entitled to benefit by; the warrants of the intervenors may be contested, as entitled to any share in the fund established, upon any ground whatsoever; the burden of establishing their claims must be discharged, before they can benefit by the decree; and against the effort to show that they are payable out of the fund, any defense, founded either upon law or fact, may be urged; this proposition is established by unquestionable authority.

"It may be observed, that where a person, not a party to the suit, carries in a claim before the Master, under the decree, the party representing the estate out of which the claim is made, has a right to the benefit of any defense which he could have made, if a bill had been filed by the claimant in Equity, or an action had been brought to establish such claim." 2nd Daniel's Chancery Pleading and Practice, 5th Edition, top paging 1211, bottom paging 1157.

"Where a person not a party to the suit carries in a claim (before the Master), the party representing the estate upon which the claim is made, may make any de-

fense which he could have made, to a bill filed by the claimant, or to an action at law brought to establish such claim." 2d Barbour's Chancery Practice, top paging 523, bottom paging 72.

The decree in favor of complainant, Warner, is in no respect a decree in favor of each of the interventors, who have appeared before the Master to prove up their claims, except so far as the subject matter of the defense set up as to the first, is identical with that set up, as to the second. The decree in favor of complainant can be a protection of the intervenors only so far as the grounds formerly set up are concerned. It forms no estoppel as against any defense to the warrants of the intervenors, which was not set up and passed upon as between complainant and defendant.

Thus, in Cromwell vs. County of Sac, 94 U. S., 351, a judgment decreeing that certain county bonds were void, in the hands of parties who did not acquire them before maturity for value, did not estop the plaintiff holding other bonds of the same series, which, in the second action, he showed that he had acquired for value before maturity, because the second action presented no issue which had been determined in the first.

Where the second action between the parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases where it is sought to be applied, the estoppel of a judgment rendered upon one cause of action, to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually* litigated or determined in the original action, *not* what *might have been* thus litigated or determined. Only upon such matters is the judgment conclusive in another action.

Fessenden vs. Barrett, 50 Fed. Rep., p. 692.

A judgment that bonds were illegal and void, does not bar a subsequent suit upon coupons of the same bonds, and does not operate as an estoppel, except as to the particular matters at issue, or points controverted in the first suit.

Geneva National Bank vs. Independent School District of Riverside, 25 Fed. Rep., p. 629.

To the same effect is Nesbitt vs. same defendant, 25 Fed. Rep., p. 635.

A judgment for defendant in an action for the recovery of instalments of interest on certain bonds, asto a suit for the recovery of subsequent interest upon the same bonds, is an estoppel to the second suit, only as to the matters at issue, or points controverted in the first suit.

Smith vs. Town of Ontario, 4 Fed. Rep. (p. 386).

Although the rule announced in the cited authorities is applied in cases arising between the original plaintiff and the original defendant, it is equally applicable to a subsequent cause, in which other parties claim against the defendant the benefits of the decree obtained by the original plaintiff; surely a judgment can not have any greater effect between a person not originally a party to it, but who seeks to avail himself of its benefit, than it could have in favor of the party who obtained it.

The points now made against the allowance of the demands of the several claimants who appeared before the Master, nowhere appear in the pleadings of the original litigation; they were never at any time set up as defenses, save partly in the oral argument and brief of defendant in the case reported in 175 U. S. Rep.; as has been seen, so far from having been adjudicated upon adversely to defendant, the Court declined, to even give them consideration; therefore, there is no warrant for the claim that defendant has been concluded upon the issues now raised; they are still open and at large as regards defendant, and furnish proper and legitimate grounds upon which the third parties

claimant should be denied participation in the fund which has been established.

But admitting, for the sake of argument, that the first decree, in favor of Warner alone, did bind defendant to the validity of any and all warrants issued under the act of purchase of 1876, the third parties now before the Court are claiming the advantages of that decree, and seek the process of the Court for its enforcement in their favor.

It is a well established rule, that where a party who has obtained a decree returns to the court of chancery, to obtain its aid in executing the former decree, it is at the risk of the opening of such decree, as respects the relief to be granted on the new bill, and if the Court be of the opinion that it was erroneous, it may refuse to execute it.

Thus, in Gay vs. Parpart, 106 U. S. 679, it was held, that where a decree erroneously declared the nature of the estate of each codefendant, and shortly afterwards deeds between the parties were made, which did not follow the decree, and where subsequently a bill in chancery was brought to perfect the partition, by compelling conveyances in accordance with the decree, the court might inquire into the equities of the parties, arising out of the surrounding circumstances, and refuse to order conveyances in accord with the title, as found by the former decree, when it would be inequitable to make such order.

The court in concluding its opinion, quoted with approval the following citition from the Supreme Court of Illinois, in Wadhams vs. Gay, 73 Ill. 415, as follows:

"Upon an appeal to equity, by original bill, to lends its assistance for carrying it into execution, because of an omission in the decree, and providing no means for its execution, it would seem reasonable that the same rule of the court's action would obtain as in case of any solemn agreement under seal, and where there are manifest the elements of injustice, mistake, surprise, apprehension,

and want of consideration, to remain passive. (See p. 699.)

"Where a party returns to a court of chancery, to obtain its aid in executing a former decree, it is at the risk of opening such decree, as respects the relief to be granted on the new bill; hence, even if it be assumed, upon the evidence, that the decree against the old corporation bound the new one, and this being in effect, in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so, if it believed the decree was erroneous, and that it was erroneous we have already decided. Inasmuch as plaintiffs came into a court of equity, to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Mitford's Chancery Pleadings, 96. Indeed, it would seem to have devolved upon it to show that the decree was a right decree."

"Upon all the facts shown in this case, the court could not originally have made a decree like this one, limiting to Charles a life estate, and declaring a remainder over in fee simple to his children after him. There is authority for the doctrine that the Court may, on a bill to carry a decree into execution, look into the case, to see if it would make the same decree a second time; in such a case it is said: in respect to the special application, to examine the decree, and it it be unjust, to refuse enforcement (Adams Equity, 416; Wadhams vs. Gay, 73 Ill., p. 430).

"Daniell in 2 Dan., Ch. 1614, citing Lawrence vs. Berney, 2 Ch. Rep., on this point says: "It is laid down, that although where a decree is capable of being executed by the ordinary process and forms of the Court, whatever the iniquity of the decree may be, yet, till it is reversed, the Court is bound to assist it with the utmost process the course of the Court will bear. But where the common process of the Court will not serve, and things come to be

26144

in such a state and condition, after a decree made, that it requires an original bill, and a second decree upon that, before the first decree can be executed—if the first decree is unjust—then this Court desires to be excused in making it its own act, and to build upon said foundations, and charging its own conscience with promoting an apparent injustice; and this obliges the Court to examine the grounds of the first decree, before it makes the same decree again."

"In the case of O'Connel vs. McNamara, 3 Dr. & Warren, 411, Lord Chancellor Sugden said: 'I do not understand the rule to be, that this Court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a party comes into this Court asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree was right,' and to like effect Hamilton vs. Houghton, 2 Blight P. C., 169; Bean vs. Smith, 2 Mason, 252."

"There are, it is admitted, authorities the other way on this subject. Story in his Eq. Pl. 430, in speaking upon it, says: 'And the court has even, on circumstances, refused to enforce the decree, although, in other cases the court and the House of Lords, upon an appeal, seem to have considered that the decree ought to be examined on a bill to carry it into execution,' and so Mitf. Ch. Pl. 96. And although it is insisted by appellee that the authorities cited are totally inapplicable to such a case as the present, we are willing to accept the principle declared as pertinent to the case of a bill seeking the particular description of relief as in this case." Wadhams vs. Gay, 73 Ill., 430.

See, also, Lawrenceburg Co. vs. Janesville Mills, 138 U. S. 56.

If the cited cases sufficiently fix the rule that this Court may examine its former decree, for the purpose of re-

strictingjits application and effect, to a class of warrants which does not include those of the third parties before the court, there can be no doubt that it is the plain duty of the court to do so: aside from the particular declarations or recitals in the prior opinions there would seem to be nothing plainer than, that what the Court intended to do, was to give only the warrants issued in payment of the price of the dredge boat, etc., a right of payment; it was not the purpose of the court to do anything more; such appears throughout as the fundamental idea, which the decree of the court carried out; therefore, it upon examination, your Honors should be satisfied, that in allowing the claims of the parties appearing before the Master, is giving to your decree an operation and effect which you did not contemplate, or which you would not now order, if the matter were before you for the first time, it is not only within the power, but it is the duty of the court,to exclude from payment the warrants of the third parties who claim the benefit of the decree in favor of Warner.

The second and third assignments are these:

Second—That the principle declared by the two said cases was that the drainage warrants in question here, so far as issued in payment of the price of property, were obligations of the city of New Orleans; that the Supreme Court did not decide, in either of said cases, that warrants issued in settlement of, or attributable to, the payment of any claim for damages held by the Mississippi & Mexican Gulf Ship Canal Company or Warner Van Norden against the city of New Orleans, were obligations of the latter, or entitled to the same rights and privileges as warrants issued in payment of the price of property; that the Court of Appeals for the Fifth Circuit erred in not so holding, and also in holding as it did.

Third—That no warrants should be considered as having been issued in payment of the price of the fran-

26145

chise of the said company, as the same was of no value to the city of New Orleans, and its acquisition by the latter gave it nothing of any value, but was, on the contrary, the assumption by it of an onerous burden, to wit: the completion of the drainage work at its own expense, for which work the company and Van Norden were entitled to charge fifty cents per square yard each for canal excavation and levee building, which charges, however, they had never been able to collect, except in an insignificant amount, thus throwing upon the company and Van Norden the loss of many hundreds of thousands of dollars; thus relieving them of a burdensome and unprofitable duty; and the Court of Appeals erred in holding that the contrary was held by the Supreme Court, that the said franchise was to be considered, as in part, a consideration for any of said warrants.

The theory of your Honors' decision found in 167 U. S., 467, is understood to be, that the city having *purchased property*, contracting to pay for it out of a particular fund, and issued warrants therefor payable out of that fund —a fund yet partially to be created, and created by the performance by the city of a statutory duty, could not deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead, in defense to a liability on the warrants drawn on that fund, that it had, prior to the purchase, paid off obligations theretofore created against the fund; that the city could not draw warrants on the fund in payment of *property* which it voluntarily *purchased*—and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payment of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but, on the contrary, to facilitate by all lawful means the collection of assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants; that

one who *purchases property*, and pays for it in warrants drawn upon a particular fund, the creation of which depends largely upon his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good.

If this be a correct interpretation of the Court's position, its conclusions were largely, if not entirely influenced by the consideration, that the city had received property from the Canal Company and its transferee, giving warrants on the drainage fund for the payment of its price, which payment it sought to defeat, although retaining possession of the property purchased, and which had been parted with by the vendors. The city's possession was like unto that of a person, who had obtained possession of the property of another for an agreed consideration, which he afterwards sought to destroy. The vendors had given up their property, and thus deprived themselves of all benefit of its use and enjoyment, which had passed to the city. Under these conditions the view of the Court was, that it would be an act of bad faith to permit the city to escape liability, for what it had promised to pay as a consideration, for the property it had received. If, as is stated, this be a correct view of the Court's opinion, it could have no application to such warrants as were issued in settlement of the claim for damages, or to the twenty thousand dollars of warrants in reimbursement of an amount of drainage taxes which had been diverted; this is specially so as to the latter, because the diversion in question occurred prior to the city's purchase, before any warrants issued under the sale of 1876 had come into existence, and the diverted funds, if properly applied, would have gone to settle a corresponding amount of warrants which had been issued to the Canal Company and its transferee for work which they had done, and for these warrants the Court, in Peake vs. New Orleans, 139 U. S. 342 et seq., decided that the city was not liable;

the process, therefore, of thus making good any diversion of taxes collected prior to 1876, would be to substitute so many purchase warrants, for so many work warrants.

It is true, as has been observed by the Court, in 175 U. S. 145, that the consideration of three hundred thousand dollars was fixed upon, not only to cover the value of the property of the plant, but the exclusive franchise under the act of 1871; the franchise, however, was nothing for which any sum of money could be fairly asked, or to which, in reason and conscience, any part of the price could be attributed; we learn from Peake vs. New Orleans, 139 U. S. 347, that from January 1, 1875, the cost of the work performed by the Canal Company and its transferee was $1,713,635.35, and that during that period the city had issued drainage warrants in payment of the same, to the amount of $1,422,263.69, and the drainage assessments being an insufficient source for the retirement of these, they were taken up by an issue of bonds; this shows the value at that time of the company's franchise, with the payment of its warrants restricted to the mode provided by its contract; the warrants were paid only by the additional and outside aid, supplied by the city's bond issue (see 139 U. S. 358); nor did the franchise, as a piece of property, improve in value up to the time of the city's purchase, as is shown by many hundreds of thousands of dollars of unpaid warrants issued for work done by the company and its transferee, the payment of which was sought to be enforced in the Peake case.

It would appear from this, that so far as concerns the franchise, that Van Norden and the company had parted with nothing which it was desirable for them to keep; their exercise of the franchise had resulted in serious, in fact, tremendous losses, diminished to an appreciable extent, only by the voluntary act of the Sate and city, the first in authorizing, and the second

in issuing, over a million and a half dollars of bonds, for the purpose of relieving the owners of the franchise of the disastrous results of its possession; the purchase of the corporate franchise by the city, was no more of a blessing than its enjoyment by its former owners; the municipality acquired the privilege of completing the drainage work, which was before the exclusive property of the company, with all its attendant advantages, to which attention has been called; the company did have the right, under the act of 1871, to charge fifty cents per square yard for excavating canals, and fifty cents per square yard for building levees; the city, for the work it undertook to do, enjoyed no such right; it is true, the concluding clause of section 4 of the act of 1876 gave the city the power to let out the work by contract to the lowest bidder, but in view of the experience of Van Norden and the company in relation to the same work, the result of such an attempt is not difficult to divine, especially so as the option was also given the city to pay the contractor out of the assessments upon the property, their availibility for such purposes, being likewise fully demonstrated by the events occurring between 1871 and 1876; the section concludes with the gracious provision of an option to the city, also to pay for the work out of its treasury, which may be considered all that was really intended to be provided in the way of funds for the doing of the work; it is therefore fair to say, that the completion of the drainage system was really intended to be accomplished, with funds derived from the city's general revenue, and for this it is not reasonable to suppose that she would be required to pay, either in drainage warrants given to the company and Van Norden, or otherwise; in disposing of its franchise the company got rid of a ruinous contract; in acquiring it the city exchanged places with its vendors, and in reality assumed a burden which had been too heavy for Van Norden and

26147

the company to bear; therefore, in reason and in conscience, no serious consideration can be given to the franchise, as a thing for which the city was intended, or can be supposed to have been required, to pay anything.

The fourth assignment, concerns the gratuitous introduction of the reimbursement of certain drainage taxes claimed to have been diverted prior to the purchase by the city, stated as follows:

Fourth—That the item of twenty thousand dollars of drainage warrants, issued in settlement of the amount of drainage taxes said to have been diverted or used by the city of New Orleans, for purposes other than the retirement of drainage warrants, prior to June 7, 1876, the date of the city's purchase, was in reality entirely beyond the authority given the city by act No. 16 of 1876, and the substitution of so many socalled "purchase" warrants for a corresponding amount of warrants issued to Van Norden and the said company in payment for work done, which latter class of warrants it was decreed that the city could be compelled to pay, in the case of J. W. Peake vs. City of New Orleans, No. 852 of the docket of this Court of the October Term of 1890.

The matter here adverted to, is found in the following clause of the act of sale of the Canal Company and Van Norden to the city, of June 7th, 1876, appearing on page 102 of the record of this court, No. 640, New Orleans vs. Warner, October Term, 1898:

"In as much as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of twenty thousand dollars of drainage warrants, in full satisfaction of the same."

The collections which were thus diverted, if properly applied, would have gone to the retirement of a corresponding amount of warrants issued to Van Norden and

the company for work done, as the diversion occurred while they were still in possession of their franchise and contract; the only loss suffered was the nonpayment of as many "work" warrants, as the diverted taxes would have taken up; therefore, to place the misappropriated sum in the form of "purchase" warrants issued under the act of 1876, would in effect place so many warrants of the precise character of those involved in the Peake case, for which this court held that the city was not liable, upon the same footing as warrants of the character involved in the present case, to which your Honors have held, that the defense maintained in the Peake case could not apply.

The fifth assignment of errors embraces and incorporates, as assignments of error here, those which were relied upon in the Court of Appeals to reverse the decree of the Circuit Court; they are in part repetitions of those already discussed; nothing already said which applies to them will be repeated; they will be argued in the particulars as to which they have not already been treated, and the Court is asked to consider as applying to them also, so much of the argument already made as is relevant.

The first assignment was that the Circuit Court erred in overruling the exception to the master's report, which is stated as a general conclusion, sustained by the grounds set out in the special assignments following, and hence may be considered as covered by what is said of the latter.

The second assignment is the following:

Second—That from the evidence before the court, accompanying the said report, it conclusively appeared that the dredge boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the City of New Orleans from Warner Van Vorden and the Mexican Gulf & Ship Canal Company, by authentic act before G. Legardeur, Jr., notary public,

26148

of date June 7, 1876, were of the value of $153,750 under the appraisement made pursuant to the act of the General Assembly of Louisiana No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7, 1876, be admitted as debts or liabilities of the City of New Orleans, and payable out of the fund ascertained by the Master's report; that any warrants in exeess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense "purchase" warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

It appears from the report of the city engineer that the dredge boats, or property having a physical existence, purchased by the city, were appraised at the value of $153,750 (see p. 95 of the record of Warner vs. City of New Orleans, No. 640 of the docket of this Court of its October term of 1898).

This assignment is made upon the theory that Act No. 16 of 1876 was the sole authority for the purchase made by the city on June 6th of that year; that the city was without power to purchase any property, or to make any contract pertaining to the same, which was not conferred by that statute; that its proper construction, restricts the right of the city to the purchase of the tools, implements, machines, boats and apparatus belonging to the Mississippi & Mexican Gulf Ship Canal Company and Van Norden, and used by it or him for or pertaining to the drainage work which the two had prosecuted from 1871 until 1876.

The powers conferred upon the city by Act No. 16 of 1876, were the following:

First—To transact and contract with the Canal Company and its transferee, for the purchase and settlement of all or any right, franchises, and privileges, created,

authorized, or arising, in favor of said company or its transferee, under and by virtue of Act No. 30 of the Acts of 1871.

Second—For the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats, and apparatus, belonging to the said company or its transferee, and by it or him used for, or pertaining to the drainage work authorized to be done by the said Act No. 30.

The "rights, franchises and privileges," in favor of the company, created by the Act of 1871, or arising therefrom, were to dig canals and build levees in the city of New Orleans, and to charge fifty cents per square yard for each class of work. (See sections 2, 3, 4, 5 and 8 of Act No. 30 of 1871.)

By the Act of 1876, and the contract made thereunder, the city was given the power to do all canalling, dredging or other drainage work required, to be paid for by assessments upon property, or from the city treasury; the effect of this was to transfer the work of completing the drainage system from the company and Van Norden, who had been entitled, under the act of 1871, to exact payment for it at the rate of fifty cents per square yard for excavating, and fifty cents per square yard for levee building, to the city of New Orleans, with no right to make any charge for it at all; funds for its payment were to be realized out of the drainage assessments, which had already proved to be insufficient to pay the warrants of Van Norden and his assignor, or out of the general funds of the city; in view of the facts disclosed by the several records of this case in this Court, it may be said that the provision for payment out of the drainage assessments was unreal, to that extent that it can not be considered as even a pretense; it is shown that the same assessments were insufficient to pay the warrants issued to Van Norden for work done, so far as to leave unpaid an amount far exceeding a million

26149

and a half dollars of such warrants, up to the time of the city's purchase; the act, therefore, in point of fact, meant and intended, that the expense of the work to be done by the city should be met by her general fund, derived, of course, not from drainage assessment, but from the general taxes provided for her alimony; (see Sec. 4 of Act 16 of 1876); the act, therefore, imposed upon the city a burden, for which it can not be supposed, unless such is the direct, positive mandate of the law, that it was intended that the city should pay a consideration, certainly not the enormous sum of money which she will be required to pay on this account if the decree in this cause be sustained; the privilege of doing the work for which the company was allowed the large compensation of one dollar per square yard, became an onerous burden to the city of New Orleans, when she was required to do the same work at her own expense, without reimbursement from any source for the drainage assessment, were demonstrated, to be worthless, as a source of revenue; therefore, it is fair to say, that no Court should regard the acquisition of the company's franchise as the gain of anything possessing the smallest element of pecuniary value, for which the city was to pay a money consideration; such a conclusion would not only be repulsive to common sense, but hostile to good conscience.

But it has been argued in behalf of complainant, that not only the "franchises and privileges" of the company, were declared to be the objects of the contract which the city was authorized to make, but also its "rights," created, authorized, or arising in favor of the company, under the act of 1871, and one of its "rights" was the claim for damages which it set up against the city, by reason of delays which had occurred in the prosecution of the company's work prior to 1876, by the failure of the city to promptly furnish lines and levels for the same; such a "right," it is clear, would not be included in the descrip-

tion of things here discussed; the language used in describing them is, "all or any rights, franchises, and privileges, created by or arising from the act of 1871;" it is quite evident that the "rights" in question were the "franchises and privileges," mentioned immediately thereafter, and the terms were used, as they are in common practice, to describe the corporate grants, prerogatives, and advantages, conferred by the act of 1871; the language, "rights, privileges and franchises" denotes one thing, and not several, namely, all that the company was authorized to do under the act of 1871, and which it would have no right to do, unless bestowed by competent authority; it is true that the term "right," which is generic, is more comprehensive than "franchise" or "privilege," which are specific, and may, in a popular, and perhaps a technical sense, be classed as "rights;" but they are terms of narrower import, signifying less, than the word by which they are preceded; it is a well settled rule of statutory construction, that when specific, follow general terms, in an enumeration, the meaniug of the latter are narrowed to the limits of the former; so that it can not be considered here that the expression "rights," includes or connotes anything more, or beyond, what is declared, or expressed by words "franchises or privileges;" besides which, the claim for damages could not be a "right," until it was admitted, both as to liability and amount, by the city, or liquidated by judgment.

If it was the intention of the Legislature, to authorize the adjustment of any claims between the contracting parties, such as demands for damages, it is altogether improbable it would have conferred such power otherwise than in express terms; nothing could be more obscure than the bestowal of such authority, if it is contained at all, in the act of 1876; it must not be considered that the Legislature would have given any such power, in language

26150

so vague and indefinite, as to require its ascertainment by interpretation, inference, or strained construction; especially relating, as it did, to an authority which it was deemed necessary to grant by special act of the Legislature; it would be surely reasonable to expect that whatever the General Assembly really intended, would have been expressed in unmistakable terms.

Stress, however, is laid upon the claim, that the city of New Orleans, by Sec. 1 of Act 16 of 1876, was authorized not only to contract with the Canal Company and its transferee, but also to *transact*, for the purchase and settlement of any and all rights, franchises, etc.; and to the word "transact" there is sought to be given the significance of "compromise," which it is insisted is fortified by the other declaration of the section, that the city should so proceed for the "purchase and settlement," of the rights, franchises, etc., the terms "transact," and "settlement," being relied upon as covering the compromise of the claim for damages.

Neither word adds anything to the meaning of the law, more than if the word "contract" alone had been used.

The authority of the city is, to "transact and contract * * * for the purchase and settlement of all or any rights, franchises and privileges created, authorized or arising in favor of said company or said transferee, under and by virtue of Act No. 30 of the acts of 1871."

It is not all clear that the word "transact," is used in the technical sense of "compromise;" if it were so, it is quite certain that it would be followed here, as it generally is in common practice, by the words, "or compromise," so as to show the definite purpose of using it as synonymous, with the compounding of differences; it is more reasonable to assign to the word a meaning in the sense of, to "treat," or to "negotiate," with the view of agreeing upon terms in accordance with which the city was to "contract;" taking the word "transact," as apply-

ing to the word "purchase," afterwards used in the sense of an authority to "transact," for the "purchase," etc., a fair reading of the law, would be this: that the city is authorized to "treat" or "negotiate" for the purchase, etc., and taking the word "contract," as relating to the word "settlement," which subsequently occurs, in the sense of an authority to "contract," for the "settlement," etc., a fair reading of the section would be, "and to contract for the settlement," etc.; the terms "transact" and "contract," followed by those for the "purchase and settlement," would naturally be considered as referring to each other in the order named, that is "transact," to "for the purchase," and "contract," to "for the settlement," etc.

No one accustomed to, or familiar with, the mode of drafting notarial acts of compromise in Louisiana, would ever think of using the word "transact" without following it with the words "or compromise."

There is no mention of the word "damages," much less, "damages arising from or growing out of the contract of 1871."

The claim for damages was neither a franchise, nor a privilege, created or arising under and by virtue of Act No. 30 of 1871; its elements were, first, the contract created by that statute, and second, a passive violation or violations thereof by the city; it would be incorrect and misleading to describe it, in the language of the section, as a right, created or arising in favor of the company, under and by virtue of Act No. 30 of 1871; such rights as were so created, or which arose in favor of the company, were the rights to dig canals, build levees, and charge for the same at fifty cents per square yard; the damages would necessarily be extraneous to the statute, and would depend upon acts of omission or commission, outside of it, from which, of itself, and apart from the doings under it, these could be created, and from which could arise, no claim in favor

of the company; the rights created or arising from the act of 1871, spoken of by section first of the act of 1876, are those which are created by the terms of the law itself, or arise from a mere reading or consideration of its provisions, which are declared by its terms, or appear upon its face; the transaction, the contract, the purchase, and settlement, which the city was authorized to enter upon, were as to those rights which the company acquired under the statute, the moment it became a complete and perfect law, by the signature of the governor and was accepted by the company; it did not have in contemplation any rights which might thereafter arise, from the acts of the parties in executing or failing to execute the drainage contract.

The concluding provisions of Sec. 6 of Act No. 30 of 1871, by which the city is made liable for the damages resulting from the failure of the city to locate the lines of canals and levees in time to prevent delay in the prosecution of the work, could find no application until such delays were caused, and manifestly this could only be at some time in the future, and this provision, of its own force, and without application to posterior delinquencies of the city, could create no claim in favor of the company, nor could any claim arise therefrom.

The third assignment of error in the Circuit Court's decree is the same as the fourth assignment here; this has been already discussed.

The fourth assignment of error in the Circuit Court's decree, repeated here, as a subdivision of assignment fifth, is the following:

"*Fourth*—That as to the remainder of the $320,000 issued, as shown by the said act of sale from Van Norden and said company to the City of New Orleans—that is, the residue after deducting the said $153,750, the value of the dredge boats, and $20,000, in satisfaction of drainage taxes claimed to have been diverted, to-wit,

$146,250, they were issued without any warrant or authority of law, the said Act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the City of New Orleans, and were a mere gratuity; that so far as said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner, Van Norden or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work by the city of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that, in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by war-

261,52

rants, in excess of the said $153,750, while, as a matter of fact, the whole amount of the $320,000 of warrants issued by the city were decreed to be payable out of the said fund, save $4000 thereof, which had been paid, in which finding the court was in error.

That the act of 1876 authorized only the purchase of the dredge boats, etc., and franchises of the canal company; that any value or importance of the latter was a mere fiction; that the twenty thousand dollars issued in satisfaction of drainage taxes claimed to have been diverted was without warrant or authority of law, have been argued under the second, third and fourth assignments; the discussion of the present assignment will be confined to the effect of the absence of any appraisement of the franchises and of the claim for damages, as regards the validity of the contract as pertaining to these, and as to the right of any warrants issued therefor to share in the fund before the court."

We have seen that respondents' contention is, that the authority of the city, under the act of 1876, was not only to purchase the franchises and property of the company, but likewise to transact or compromise and settle all rights and claims at large between the parties. Should this be true, under this assignment we will endeavor to show that the contract was absolutely void, so far as concerns the purchase of the franchise, and the settlement or compromise of the claim for damages, and this by reason of the nonobservance of a condition precedent required by the act of 1876, as a prerequisite of any right of the city at all to make any contract by its authority.

Section 2 of the act of 1876 declares, that should the city deem it advisable to make the purchase and settlement authorized by section one, it should be the duty of the council to provide by ordinance, for the appointment of appraisers, to estimate the value of the rights and things to be purchased and settled for, and that the duties

and powers of said appraisers should be specially assigned in the said ordinance; there was a compliance with this provision so far as concerns the dredge boats, etc., which were appraised at $153,750; the appraiser expressly declares, after citing certain data, that he was unable to arrive at a conclusion, to make any appraisement of the mooted claim for damages; (see record of this court No. 640, October Term, 1898, pp. 95 and 97); there is no pretense even of an attempted appraisement of the franchise; the contract, so far as the value of the dredge boats was concerned, was made in accordance with the statute enabling the city to act, and in this respect the contract can not be assailed.

But in any event the contract could have no effect whatever, as concerned a purchase of the franchises of the company, nor as a compromise as a claim for damages, by reason of a failure to observe a condition precedent to the making of any contract at all, authorized by Act No. 16 of 1876.

By Sec. 2 of Act No. 16 of 1876, it was made the duty of the Council of the City, in the event it was deemed advisable to make the purchase and settlement authorized by Sec. 1, to provide by ordinance for the appointment of appraisers, to estimate the value of the things to be purchased or settled for; it must be understood, that the discharge of the duty thus imposed upon the Council, was a condition precedent to the validity of the purchase and settlement so authorized; it can not be assumed that the General Assembly would have incorporated this condition in an entire section of the law, substantive and independent of the other subject matter, if it had not deemed the requirement to be of such consequence as to make the validity of all that was subsequently done, depend upon its observance.

The appraisement was an indispensable prerequisite, to

the valid and legal purchase or settlement of any matter at all, under the contract which was authorized.

"Respecting the mode in which contracts by corporations should be made, it is important to observe that when, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation."

1st Dillon's Municipal Corporations, Sec. 449, 4th Ed.

See note on the same, p. 512, as follows: "Speaking of this subject in the case above cited, Marshall, C. J., says, 'the act of incorporation is an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must preserve that mode, or the instrument no more creates a contract than if the body had never been incorporated.'"

It will be conceded, that the powers of the City Council are not derived from general law; that its only power to act in any case is derived wholly from statute, and that therefore it possesses no power except such as is expressly so granted, or may be incidentally necessary to carry into execution, the power which the statute expressly gives.

It may also be laid down as a general rule, that the power given, must be exercised in the mode prescribed by the statute; hence, when the statute prescribes a particular way in which the corporation is to act, it can only act in the mode prescribed; to sanction a contrary doctrine would place corporations above the law, and would, to say the least, be fraught with dangerous consequences. If such doctrine should prevail, is there not reason to fear that corporations might soon become intolerable nuisances?

When the fair interpretation of a statute, which directs acts and proceedings to be done in a certain way, shows that the Legislature intended a compliance with such pro-

vision, to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite condition must exist prior to the exercise of the power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory; under such conditions the corporation has no election as to how the duty shall be performed, and municipal officers have no option or authority to act differently from the mode particularly prescribed.

Turning to Section 2 of Act 16 of 1876, we find, that if it should be deemed advisable by the council to make the purchase and settlement authorized by Section 1, "*It shall be the duty* of said council of the city of New Orleans to *provide by ordinance* for the appointment of appraisers, to estimate the value of the rights or things to be purchased or settled for, and the *duties and powers of said appraisers shall be specifically assigned in said ordinance.*

A solemn, imperative, and absolute duty, could not be prescribed in more emphatic terms; so important was its careful observance in the mind of the Legislature, that it provided a mode of appointment for the appraisers, that is, by ordinance, and descended to the details thereof by specially ordaining, that it should expressly assign the duties and powers of the appraisers. It would not only do violence to the expressed will of the Legislature, but invade every reasonable presumption to suppose, that a requirement set out with such particularity, could be disregarded without working the absolute nullity of the contract, so far as made without its observance.

It is quite clear that the Legislature intended that there should be more than one appraiser, while here the estimate was made by the city engineer alone; he made no attempt to appraise the value of the franchises and privileges of the company, which are not even mentioned by name in his report; as to the claim for damages, he made

26154

an effort to place a value upon the same, but declared his inability to reach a result; he did appraise the dredge boats and other property of a like character having a tangible existence; so far as this, the contract may be said to have been made in accordance with the statute; but in reference to the franchises and privileges of the company and its claims for damages, the appraisement imperatively required by the law as a condition precedent not having been made, they can not be considered as forming any part of the agreement.

It is clear that the purpose of the legislature was, that the council should be furnished with a reliable estimate of the things to be sold, to be fixed by the appraisers selected in accordance with the law, so that it could be intelligently determined what price should be demanded; it was not intended that the council should make the appraisement; such power was expressly withheld from that body, and conferred upon appraisers to be selected by the city; the council had no power at all, except what was given by the statute, and it was without right to usurp a function which the statute had vested in other persons; as has been seen, the Act of 1876, in respect to appraisement, was observed as to the dredge boats, derricks, etc., alone, and wholly ignored with reference to the franchises and privileges, and demand for damages, which it is claimed were also objects of the contract.

In Addis vs. City of Pittsburgh, 85 Pa. (State), 379, it was held, that where the law requires that contracts for certain municipal work should only be made after due advertisement, and the lowest bidder, neither the municipality nor its officers could make a binding contract, unless in the prescribed manner.

In Leavenworth vs. Rankin, 2 Kansas, p. 370, a contract for grading streets was decreed void, because no petition for the work, by a majority of the resident property owners to be affected by the tax, had been presented

to the council, as required by the ordinance authorizing the contract; and if such be the law as regards a requirement imposed by the city herself, it would, for the greater reason, apply to a condition precedent to the making of a contract prescribed by the Legislature in the statute authorizing the contract to be made; the Court said, (p. 371):

"Municipal corporations are creatures of the law, and possess no powers except such as are conferred by the law. They act under prescribed rules, and must act in accordance with them. They can not in any sense be said to act as natural persons. When they undertake to make contracts, they must observe the regulations prescribed in that behalf, else there will be no contract, and no subsequent act can cure the defect."

In McCoy vs. Briant, 53 Cal. 249, the city was authorized to issue bonds at such time or times as its board of trustees might by resolution direct; there was a bond issue, but directed by no resolution, as was required; the bonds were held void; the Court said, *arguendo:*

"It is a general and fundamental principle of law that *all* persons contracting with a municipal corporation must, *at their peril inquire into the power* of the corporation, or its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation." (Dillon on Municipal Corporations, Sec. 372.) And where the *mode* of contracting "is specially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will not bind the corporation." (Dillon on Municipal Corporations, Sec. 373.) In Argenti vs. San Francisco, 16 Cal. 283, Mr. Justice Field says: "A municipal corporation can only act in the cases and in the *mode* prescribed by its charter." In McCracken vs. San Francisco, 16 Cal. 620, the same learned judge, in delivering the opinion of the court, says the common council were

the mere agents of the corporation, and possessed only such powers as were specially delegated to them by the charter, and when that instrument granted a power with a specific designation as to the mode in which it should be used, the mode was restrictive—no other mode could be followed. In Zottman vs. San Francisco, 20 Cal. 102, the Court says: "The rule is general, and applies to the corporate authorities of all municipal bodies—when the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power." The same proposition was affirmed in Murphy vs. Napa County, 20 Cal. 503; French vs. Techemacher, 24 Cal. 550; Herzo vs. San Francisco, 33 Cal. 145; People vs. Tomlinson, 35 Cal. 507, and in later cases.

In Town of Durango vs. Pennington, 8 Colorado, 259, speaking of a municipal contract for grading streets, it was declared:

"We understand the law to be well settled, that when the mode of proceedings in respect to transactions of this nature is prescribed by law, or in the charter of a municipal corporation, such mode must be strictly pursued by the corporation, in relation to the awarding and making of contracts, or no liability is thereby incurred. The party dealing with a municipal body is bound to see to it that all the mandatory provisions of the law are complied with, and if he neglects such precaution, he becomes a mere volunteer, and must suffer the consequences." Citing authorities.

In Worthington vs. Covington, 82 Ky., 265, the charter of the defendant required that all contracts for street improvements should be referred to a committee of the city council; such a contract was made without such reference; it was held to be nonenforceable: the court declared that the council had not taken the steps which

gave it the right to contract, or to create a lien upon the property of the appellant, for the cost of the improvement, and which action was a condition precedent to the exercise of its power to do so, or to make the assessment.

The analogy between this case and the one at bar is striking; the requirement of the reference to a special committee of the ordinance in the Kentucky case, is precisely the same in character as the requisite here, of an appraisement of the property which was to be the subject of the contract authorized by the act of 1876; this latter, as is declared of the reference to a committee, in the cited case, was a necessary step to give the city any right to contract at all, and was a condition precedent for the exercise of whatever power the act of 1876 granted.

We have seen that the appraiser failed and declined to place any valuation upon the claim for damages. (See Record 640, p. 96). And none was made of the franchise.

It appears (see Record 640, p. 97), that the damages claimed by the company were for 190,000 cubic yards, which were not excavated by the dredge boats, by reason of the prevention by the city authorities of the city surveyor, furnishing the necessary lines and levels; but the appraiser finds that of the five boats claimed to have been delayed, only three were actually so delayed, boat number one for five and a half months, boat number four for the same period, and the "clam shell" for four months, all of which the appraiser estimates, would have excavated, during the period, 149,445 yards; this would have been worth, at fifty cents per square yard, the charge for this class of work fixed by Section 9 of Act 30 of 1871, $74,722.50, instead of $146,250, the difference, considering the franchise as for value, between $153,750 (see Record 640, p. 95), the value of the actual property having a physical existence, such as boats, derricks, etc.,

and the $300,000 in warrants paid by the act of purchase and the claim for damages, or $71,527.50 in excess of the figure at which the surveyor estimated the damages, but did not have sufficient confidence in his estimate to make it a valuation and appraisement, as he was requested to do; so that if even the damages were properly a part of the amount to be paid by the city, they have been vastly overpaid, so far as any data is given by the report of the appraiser.

But in any event, the appraiser, whose appointment is expressly directed by section 2 of the Act of 1876, placed no value at all upon the claim for damages, and none could be given it by any one else, nor could it form any part of the things for which the price was to be paid unless previously fixed by the appraiser.

The fifth subdivision of the fifth assignment of errors, being the fifth relied upon in the Court of Appeals, points out the mode in which the $153,750 of warrants entitled to be paid out of the fund in court can be separated and distinguished from the remainder, which are attributable in gross to the price paid for the corporate franchise, the amount which may be referred to the settlement of the claim for damages, and $20,000 issued in reimbursement of drainage taxes diverted; it appears that the warrants issued under the act of June 7, 1876, were numbered 313 to 402, consecutively; (see record brought up in Court of Appeals, pp. 53-55); that warrants 393 to 402 were issued in payment of the $20,000 in compromise of drainage taxes diverted; (see same record, p. 52); of these it appears that warrants 400 and 401 have been paid; that warrant 402 is included in the claim of Wilder & Co., upon which judgment at law was obtained in the Circuit Court May 28, 1898; (see same record, p. 45); therefore, of the warrants presented for payment, warrants 393 to 399, inclusive, and 402, are susceptible of precise identification; it has been argued that the judgment at law in

favor of Wilder & Co. on warrant 402 is of no more significance than the warrant itself, the judgment being in the same terms as the warrant—that is to say, payable out of drainage taxes; the identity of the warrants is not lost, and even if it were, the judgment is obligatory in like same tenor and effect as the warrant is, and no more.

As regards the other warrants, taking them in their numerical order, when they reach an amount of $153,750, all bearing subsequent numbers are stricken with invalidity; the reason why their numerical order should prevail is that it must be presumed that the parties proceeded first to do what they were authorized to do, and not have begun with what they were without right to do; that is to say, that warrants must be presumed to have been first issued in payment of the price or value of the dredge boats, derricks, etc., and afterwards on account of the corporate franchises, claim for damages, and reimbursement of diverted taxes. See list of warrants, record from Court of Appeals, pp. 53–55

The sixth and seventh assignments of error are summaries of those already discussed; it is not considered necessary to devote any attention to them, beyond what is involved in what we have already said.

Respectfully submitted,

SAMUEL L. GILMORE,
City Attorney.

BRANCH K. MILLER,
Solicitors for Petitioner.

May, 1900.

No. 649 281

Appx. to Br. of Gilmore & Heller for Petitioner

Filed May 14, 1900.

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 649

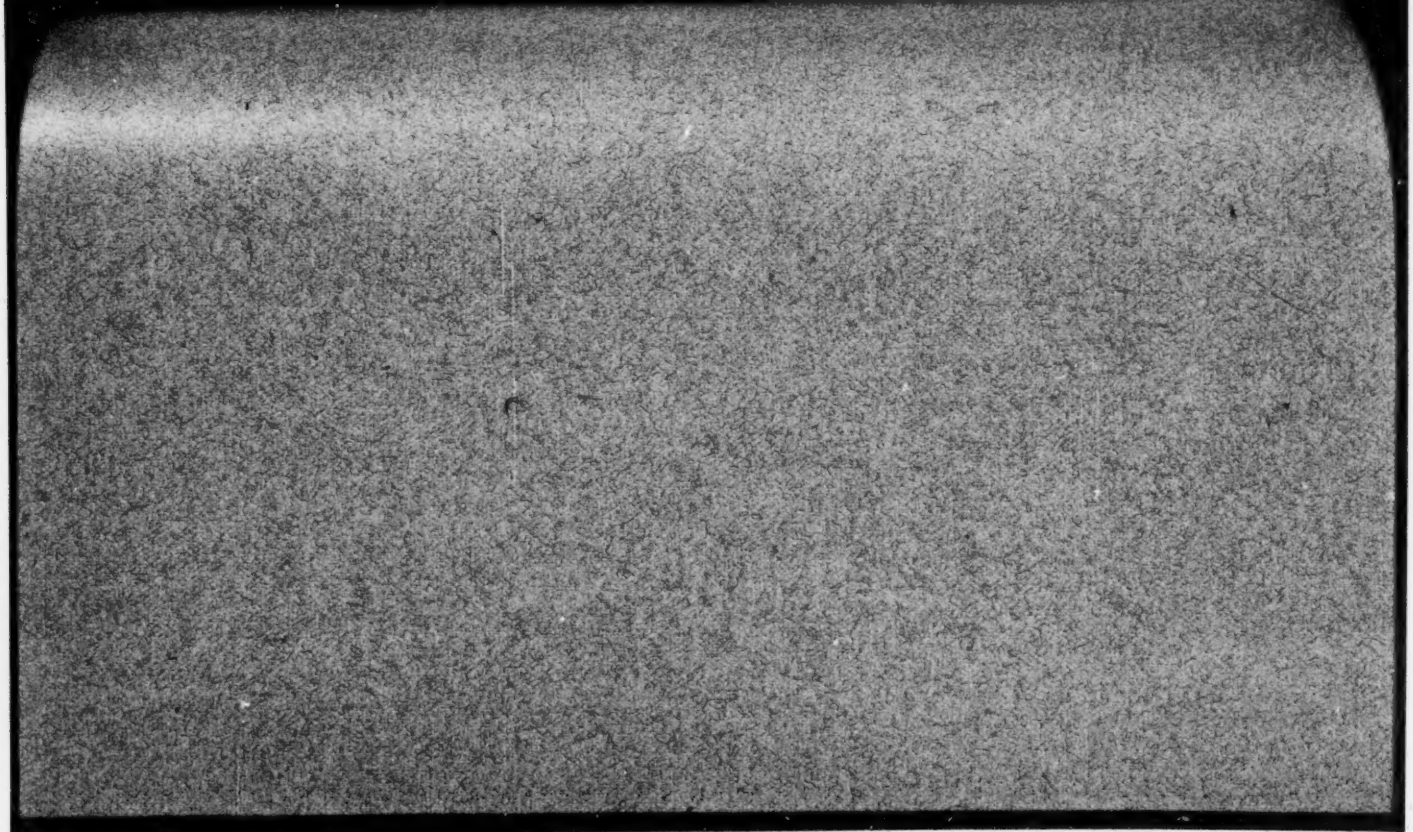
THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

versus

JOHN C. WARNER, JOHN CROSSLEY'S SONS, THE SUFFOLK NATIONAL BANK, FRANCIS JAMES GARQUET, WILDER & COMPANY, MRS. FRANK N. BUTLER, IN HER INDIVIDUAL CAPACITY AS WIDOW IN COMMUNITY, AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FRANK N. BUTLER, HER DECEASED HUSBAND, MRS. MARY E. TALIAFERO, AND MRS. ELIZA J. LYTLE, DATIVE TUTRIX, RESPONDENTS.

Copies of Acts of the General Assembly of the State of Louisiana, No. 30 of 1871, and No. 16 of 1876.

A. W. HYATT STAT'Y MFG. CO., LTD., N. O.—83,420.



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Copies of Acts of the General Assembly of the State of Louisiana, No. 30 of 1871, and No. 16 of 1876.

No. 30.) AN ACT

To provide for the drainage of New Orleans.

WHEREAS, The proper and efficient drainage of the city of New Orleans is of paramount importance to the sanitary and commercial interests of the city, as also of the State of Louisiana; and whereas, the Mississippi and Mexican Gulf Ship Canal Company are prepared to immediately undertake the work with the only kind of machinery adapted thereto and now ready for use, and to prosecute the same with energy and economy to completion, therefore—

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the Mississippi and Mexican Gulf Ship Canal Company, a corporation now existing and domiciled in the city of New Orleans, be and is hereby authorized and empowered to excavate drainage canals and build protection levees within the present corporate limits of New Orleans and Carrollton, under the conditions and with the stipulations hereinafter expressed.

SEC. 2. *Be it further enacted, etc.,* That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig a canal, and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city of New Orleans, and near the shore of Lake Pontchartrain; the exact location of the said canal and levee, and of all canals dug and levees built by the said company, to be designated and fixed by the Board of City Administrators, and the title to the lands necessary for said works to be procured and held, for the benefit of the city of New Orleans, by the Board of Administrators of the city of New Orleans; the said lake shore canal to be not less than sixty-five feet wide on the surface, and fifteen feet deep in the middle, with proper slope of the sides, the said canal or canals along the lake shore to serve as a reservoir for draining the city of New Orleans and the lands in the rear of the city, the drainage to be pumped from the canal over into the lake, and the said protection levee to be not less than one hundred feet wide, and of sufficient height to completely protect the city from overflow from Lake Pontchartrain.

SEC. 3. *Be it further enacted, etc.,* That said company shall also be authorized and empowered to excavate canals of the dimensions, and at such localities as may be fixed by the Board of Administrators of the city of New Orleans, which shall fully drain the area bounded by the protection levees herein contemplated and the Mississippi river, and connect with the drainage canals now located in the said area.

SEC. 4. *Be it further enacted, etc.,* That the said company shall also be empowered and authorized to build a canal and protection levee below the city of New Orleans to connect the lower end of the protection levee, along the lake, with the Mississippi, of a sufficient size to fully protect the city from overflow, and on a line to be designated by the Board of Administrators; and to construct a like canal and protection above the city, the dimensions and locality in like manner to be designated by the said

Board of Administrators; the object of these two canals and protection levees to be the protection from overflow of the area between the Mississippi river and Lake Pontchartrain, above the New or Company canal, and below the Carondelet canal.

SEC. 5. *Be it further enacted etc.*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig all the smaller canals, required for the drainage of New Orleans and the lands in the rear of the said city, of the dimensions of ten feet or more than ten feet in width.

SEC. 6. *Be it further enacted, etc.*; That the Board of Administrators shall be required, and that it is hereby made their duty, immediately after the passage of this act, to locate the lines of the canals and protection levees, specified in the various sections of this act, in time to prevent delay in the prosecution of the work on the part of the said company. The Board of Administrators are also required to build and run all the pumps and drainage machines necessary to lift the drainage water from the said canal or canals over into Lake Pontchartrain, and moreover to keep the water in the canals in process of excavation, so far as practicable, at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands; and should the City Council fail to locate the lines of said canals and protection levees above specified, the city of New Orleans is hereby made liable to the said company for the damages resulting from such delay.

SEC. 7. *Be it further enacted, etc.*, That said Mississippi and Mexican Gulf Ship Canal Company shall be required to have ready for work, within fifteen days after the passage of this act, machinery of sufficient power to excavate at least twenty-five thousand (25,000) cubic yards per month, and to move the same the distance required to build the protection levee, and to increase as soon as practicable their machinery to the capacity of at least fifty thousand cubic yards per month.

SEC. 8. *Be it further enacted, etc.*, That at the end of every month it shall be the duty of the City Surveyor of New Orleans, or an engineer appointed, by the Board of Administrators for that purpose, to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company, during said month, and upon the measurement of the width and depth of the canal, canals or parts of canals dug, and protection levees built, certify as to the number of cubic yards excavated and the number of cubic yards of protection levees built during the said month. It

shall be the duty of the Administrator of Accounts, on the presentation to him of the said certificate of the City Surveyor or engineer appointed by the Board of Administrators, by the President of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavation, and fifty (50) cents per cubic yard for the protection levee, the said warrants to be of such denomination as may be required by the President of the said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to indorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants.

SEC. 9. *Be it further enacted, etc.*, That in order to provide funds for the payment of the work to be done by the said company, the three boards of drainage commissioners for the drainage districts of Orleans and Jefferson, established under the acts of March 18, 1858, of March 17, 1859, and the several amendments thereto, and any and all other person, persons, or corporations, who may have them in possession, shall transfer to the Board of Administrators of New Orleans all moneys, assessments and claims of drainage in their hands or under their control, all titles to real estate, all books, plans, tableaus, judgments in favor of commissioners, the office furniture of said drainage commissioners, a true statement of the claims of said drainage commissioners against the city, to be adjudicated and settled out of the money collected by the city, and everything pertaining to said drainage districts; that the Board of Administrators of New Orleans, be and are hereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of the several draining districts, or of any other corporation charged with the duty of drainage and leveeing within the limits of the city of New Orleans and Carrollton; that the Board of Administrators be and are hereby authorized and directed to collect from the holders of property within the said districts the balance due on the assessments, as shown by the

books of the first, second and third drainage districts, under the acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, which said assessments are hereby confirmed and made exigible, at such time and in such manner as the Board of Administrators may designate; *provided*, that the said board shall collect the assessments herein authorized in time to provide for the payment of the warrants to be issued to the said company at the date of their issue; also, to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under, and created by, the acts of March 18, 1858, and of March 17, 1859, and amendments thereto, and on such other lands as are brought within the protection levees contemplated by this act, where no assessments have been made; and to execute and enforce the same as provided for by the several acts of the Legislature, creating and regulating said boards of draining commissioners; *provided*, that all money or moneys received by the said Board of Administrators from the said commissioners of the drainage districts, either from the sale of property received from the said commissioners, from the collection of claims for drainage now due, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with the provisions of this act; and that all property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage; *and provided further*, that the rights, powers and faculties possessed and enjoyed by said Board of Administrators of New Orleans, relative to drainage, shall be so construed as not to conflict with the rights, powers and faculties acquired by the said company, in excavating canals and building levees, as stipulated in the various sections of this act.

SEC. 10. *Be it further enacted, etc.*, That all acts and parts of acts in conflict with, or inconsistent with the various provisions of this act, are hereby repealed, and especially the act entitled "An Act to repeal all laws and parts of laws creating drainage districts in certain portions of the parishes of Orleans,

Jefferson," etc., passed March 2, 1869, generally known as the Ship Island canal bill; also, an act amendatory thereto, approved March 16, 1870.

SEC. 11. *Be it further enacted, etc.,* That it is hereby made the duty of the Board of Administrators to see that the parties whose duty it is to do the same, shall, immediately after the passage of this act, build such levees on both sides of the Carondelet canal, and the New, or Canal and Banking Company's Canal, extending to Lake Pontchartrain and around their basins, as to effectually prevent the overflow of water from the said canals during storm, tides or high water in Lake Pontchartrain, the dimensions of said levees to be determined by the Board of Administrators.

SEC. 12. *Be it further enacted, etc.,* That this act shall be favorably construed, so as to favor all the purposes and objects of the same, and the operations of the provisions thereof, and shall take effect from and after its passage.

(Signed) GEO. W. CARTER,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

A true copy:

GEO. E. BOVEE,
Secretary of State.

(Act No. 16 of 1876.)

AN ACT.

To authorize the city of New Orleans to assume exclusive control of all drainage works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company, and its transferee; and to provide for the manner of making said purchase and for paying therefor in drainage warrants.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly*

convened, That the Common Council of the city of New Orleans is hereby authorized and empowered to transact and contract with the Mississippi and Mexican Gulf Ship Canal Company, and the transferee thereof, for the purchase and settlement of all or any rights, franchises and privileges created, authorized, or arising in favor of said company, or said transferee, under and by virtue of Act No. 30 of 1871; also for the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats, and apparatus belonging to said company, or its transferee, and by it or him used for or pertaining to drainage work authorized to be done by said Act No. 30.

SEC. 2. *Be it further enacted, etc.*, That should it be deemed advisable by said Council to make said purchase and settlement, it shall be the duty of said Council of the city of New Orleans to provide, by ordinance, for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance.

SEC. 3. *Be it further enacted, etc.*, That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the city of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of the said company under Act No. 30 of acts of 1871 for work done. They shall be made payable out of the drainage assessments, and shall be issued as soon as any agreement shall have been completed.

SEC. 4. *Be it further enacted, etc.*, That whenever the sale and purchase contemplated by this act shall be completed, and the drainage warrants issued in payment of the price agreed on and fixed, the city of New Orleans, through its officers, shall have exclusive control of all the rights, powers and franchises granted by Act No. 30 of acts of 1871 relative to drainage or other public works to the Mississippi and Mexican Gulf Ship Canal Company, or its transferee; the city of New Orleans shall alone have the power, either through its own officers and employees, or by contract to the lowest bidder, to do all canaling, dredging, ditching, or drainage work required to be paid for by assessment upon property or from the city treasury.

SEC. 5. *Be it further enacted, etc.*, That hereafter the City Council shall fix the dimensions of all canal excavations and protection levees required for the city of New Orleans.

SEC. 6. *Be it further enacted, etc.,* That all laws, or parts of laws, in conflict with the provisions of this act, or inconsistent therewith, be and are hereby repealed, and that this act take effect from and after its passage.

(Signed) E. D. ESTILETTE,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

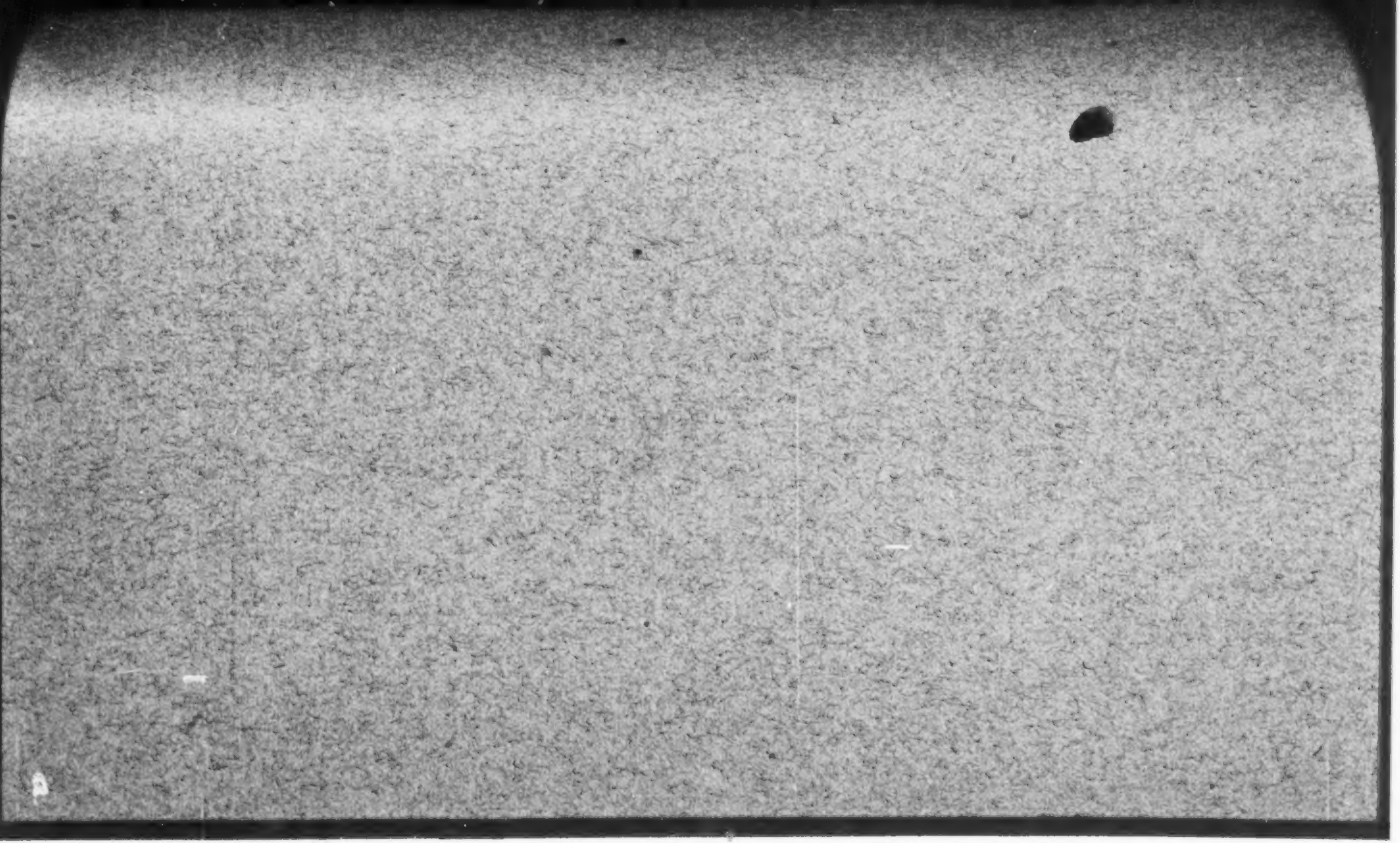
Approved February 24th, 1876.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:

(Signed) P. G. DESLONDE,
Secretary of State.

2616



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SUPREME COURT OF THE UNITED S

OCTOBER TERM, 1900.

No. 281.

Filed Dec. 19, 1900.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

ANN WARNER, ET ALS., HEIRS AT LAW OF JOHN G. WARNER, DECEASED, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. Supplemental Brief for Petitioner.

SAMUEL L. GILMORE,
City Attorney.
F. B. THOMAS,
Assistant City Attorney.
BRANCH K. MILLER,
Solicitor for Respondent, the City of New Orleans.

December, 1900.

L. Graham & Son, Ltd. New Orleans.

26164

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS, PETITIONER,

versus

ANN WARNER, ET ALS., HEIRS AT LAW OF JOHN G. WARNER, DECEASED, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, Supplemental Brief for Petitioner.

In reply to the argument for Respondents, exploited both orally and in the several briefs filed in their behalf, that the points now insisted upon by the Petitioner were not raised before the Master, but, it is sufficient to say that they were considered by the Master in manner and form as now presented and were made by him the subject of a special report (see Record, p. 106 *et seq.*); besides this, under the same exceptions, the present contentions of Petitioner were entertained and passed upon by the Circuit Court, and were made the subjects of the assignments of error for the appeal taken by petitioner from the Circuit Court to the Court of Appeals (see Record, p.

150). These were disposed of by the Court of Appeals itself by its decision, that all questions thereby raised had been settled adversely to the appellant in 167 U. S., p. 462, and 175 U. S., p. 120 (see Record, p. 164).

It would appear therefore that the exceptions made before the Master, in his appreciation, sufficiently raised the questions which are now noted, so far as to provoke his special report upon the same adversely to Petitioner that the findings of the Circuit Court, sustaining those of the Master, would show that the issues were made and contested by Respondent before that tribunal; that the conclusion of the Court of Appeals that all of these, which were set out in the assignment of errors, upon which the case was carried to that court, had been already passed upon by this court adversely to Respondents, surely demonstrates that the Court of Appeals had no difficulty in entertaining the issues which are now made.

The objection of Respondents to the sufficiency of the showing made before the Master, would appear more extraordinary in view of the fact that no such exceptions or point was made by them before the Master, before the Circuit Court, or before the Circuit Court of Appeals, but makes its appearance for the first time here, upon a record which shows that Respondents at all times had conducted themselves as though the questions now before the court, were matters fully cognizable before the Master, before the Circuit Court, and before the Court of Appeals.

The suggestion that Ann Warner, Joanna McCrossin, Mary E. Warner, and Henry Warner, the legal heirs of John G. Warner, by reason of his death substituted as parties complainant in the record, and John J. Donaldson are not parties to the appeal from the Circuit Court to the Court of Appeals, is addressed to this Court to little purpose, since who was bound by that appeal, is a question for the courts from which, and to which, it was taken, and can fairly form no part of the discussion here; the

26165

appeal was taken in open court, and hence no citation was necessary to any of the parties (see Record, page 149); the name of John G. Warner appears in the appeal bond instead of that of his heirs substituted complainants, and the name of John J. Donaldson does not appear in the bond at all (see Record, page 152); it was clearly the understanding of Respondents that those parties whose names were omitted, were parties to the appeal, especially so by the stipulation found on page 148 of the record, in which it is expressly declared that the appeal was taken from the decree rendered in favor of the several parties, the Warner heirs, and John J. Donaldson being mentioned as some of these; in the stipulation found on pages 145, 153 and 154, the name of the complainant in the case is set out as John G. Warner, which would show notwithstanding his death, and the substitution of his heirs in his place and stead, that the use of his name in this connection was a sufficient description of the parties complainant to the suit; besides the stipulation on page 165 of the record, in caption of which "Ann Warner et al." are declared to be the "appellees" in the suit, while the signature of respondents' attorneys (page 166) declares them to be "attorneys for Ann Warner et al." Referring to the statement made in oral argument and brief for respondent, that the rule stated in 2nd Daniell's Chancery Practice, 1210, had been overruled, as would appear by note "a" to that section, an examination of note "a," as well as the case of Richmond vs. Irons, 121 U. S., page 27, relied on by respondents to bear out their statement will show that the doctrine relied on by petitioner has not been overruled, but on the contrary is expressly affirmed by that case (121 U. S., 52), which declares that before a creditor appearing to avail himself of a decree, can be allowed any of the advantages thereof, he must prove that he was a creditor at the time of the filing of the bill, and that any defense which existed at that time to his claim,

either to diminish or defeat it, might be interposed either before the Master, or on the hearing of the court; that it was only after his claim had been established, that the intervenor became entitled to the benefit of the proceeding as virtually a party complainant from the beginning; the plea of the statute of limitations which was set up against the creditor appearing in that case, would have been maintained had the requisite time elapsed before the filing of the bill; all that the case holds is, that the commencement of the proceeding suspends the statute of limitations, as to any creditor whose claim is not prescribed or barred by limitation, when the bill was filed, and who afterwards succeeds in establishing that he is a creditor, as against any defense existing at the filing of the bill, which may be pleaded to his demand.

The grounds of defense urged against the warrant holders, who subsequently intervened, if they are well founded, existed prior to the filing of the original bill in this case, and hence under the very case of Richmond vs. Irons, were unaffected by the proceedings instituted by Warner.

It may be here repeated that if any allowances for damages is made for any portion of the Three hundred thousand dollars of warrant issued under the act of 1876, the Court would then hold the City of New Orleans responsible for drainage work which had not been done by the Canal Company and Van Norden, by reason of the City's fault, in the face of the fact that in Peake vs. New Orleans, 139 U. S., page 342 *et seq.*, this Court found that the City was not liable for the same kind of work, which in point of fact had been done, or upon warrants issued in payment of such work.

As to the twenty thousand dollars of warrants, in addition to the three hundred thousand dollars for which there was a pretense of authority, which were introduced into the act as a gratuitous assumption by the city, the same

26166

may be considered in the same view as that suggested concerning such of the three hundred thousand dollars of warrants as might be considered a compensation for work which Van Norden and the company were prevented from doing, by reason of the city failing to furnish the lines and levels therefor.

This twenty thousand dollars of warrants given in reimbursement of drainage taxes diverted to the City's general purposes, instead of being applied to the drainage warrants, was not an unlawful diversion under the doctrine of the Peake case from a purpose which was lawful, and hence the diversion gives no ground for reimbursement.

The claim of Wilder & Company, which was reduced to a judgment at law (see Record, page 158) in an action brought by Wilder & Company upon the law side of the court, during the pendency of this present suit of Warner vs. New Orleans, gave Wilder & Company no greater rights so far as concerned the fund established in this case than they would have had if they brought no action at law, but sued upon their warrants alone; it should be observed that the judgment at law is in the precise terms of the warrant itself—that is, "payable out of drainage taxes, and judgments created and rendered under, and in pursuance of said acts No. 165 of 1858, No. 191 of 1850, No. 57 of 1861, and No. 30 of 1871, and act No. 16 of March 24, 1876."

It was never at any time disputed that these warrants were payable out of the drainage taxes when collected; the terms of the warrants being simply duplicated by the terms of the judgment, the meaning of the latter is precisely the meaning of the former, no more, no less, but conferred only such rights as had existed and in point of fact were fully recognized, not only before the Wilder judgment was rendered, but before the action therefor was commenced.

It required the present suit and all the proceedings and decrees herein to bring to the drainage warrant holders any nearer payment, than they were before; but this extended or not to Wilder & Company, the same before as after they had obtained their judgment, which of itself established no rights whatever to the fund established in this case, and the distribution of which was the subject of consideration by the Master; this sufficiently appears by the action of Wilder & Company themselves, who formally appeared before the Master to establish their claim, which would have been unnecessary, if, it had been already sufficiently established, for the purpose of sharing in the benefits of the decree in this case, by the judgment of law which they had previously obtained; this is specially shown, by the conduct of Wilder & Company before the Master, in relying upon, *not* their judgment at law alone, but also the warrants themselves, upon which it was founded (see Record, page 130).

The circumstance that two of the warrants of Wilder & Company had been previously paid out of drainage taxes admits nothing, except the fact, which has never been disputed, that whenever the drainage taxes were collected they were applicable to the warrants.

In reference to a question asked by a member of the court, whether the city, before the master, filed any formal answer setting up defenses against the allowance of any of the claims of the intervenors, it may be said that the decree of the Circuit Court of Appeals allowed such warrant holders as were entitled to establish their claims before the Master to do so, "without being required to file formal interventions or to obtain special leave of the court," and hence, no pleadings being required by the claimants, neither could it be exacted from the defendant (see Record, page 96).

Touching the claim of Respondents, that Petitioner should be mulcted in damages for the taking of the present

26167

proceeding, it may be said that the execution of Respondent's decree has not been delayed one hour by any of the proceedings which have been taken since its entry; the appeal from the Circuit Court of Appeals was without *supersedeas*, and hence interposed no obstacle to the enforcement of the decree; the application to this court for a *certiorari* to review the decree of the Court of Appeals, has likewise placed no hindrance in the way of Respondent's satisfaction of their judgment; the grevious offence of Petitioner's application for *certiorari*, which is so plausibly railed at by Respondent's brief, may be considered venial, in view of the larger offence of this Court of granting the writ, the application of which is treated as so great a shock to Respondents.

It is deemed not improper to state here a fact which, doubtless by an inadvertence, was not mentioned in Respondent's brief; this is, that they have issued their execution upon the decree of the Circuit Court, and have actually proceeded to obtain payment of their decree, a circumstance which finds itself in strange company when placed alongside of their very spirited demand for the imposition of damages occasioned by the delay of obtaining satisfaction of their decree, brought about by the present decree.

Respectfully submitted,

SAMUEL L. GILMORE,

City Attorney.

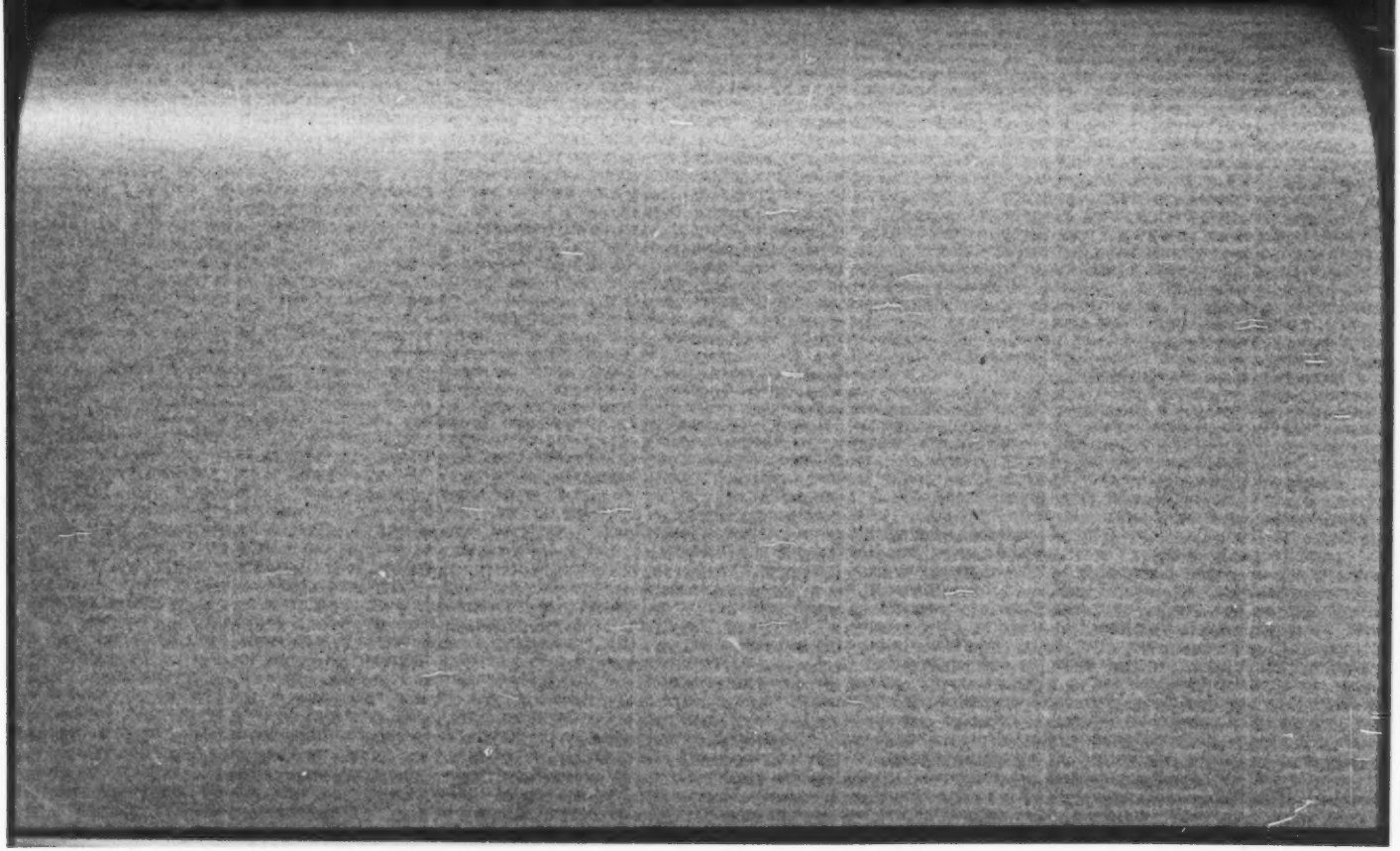
F. B. THOMAS,

Assistant City Attorney.

BRANCH K. MILLER,

Solicitors for Respondent, the City of New Orleans.

December, 1900.



Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk

26169

No. 281.
Motion for Leave to file Bond.

Filed Dec. 13, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

ANN WARNER ET ALS., RESPONDENTS.

FRANK B. THOMAS,
Assistant City Attorney,

BRANCH K. MILLER,
Solicitors for City of New Orleans

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-13-1900

26170

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

ANN WARNER ET ALS., RESPONDENTS.

Now comes the City of New Orleans, by Frank B. Thomas and Branch K. Miller, its solicitors, and considering the following stipulations and agreements consented to and signed by solicitors for respondents, to wit:

1st. That found on page 145 of the record, filed March 24, 1900, consenting to certain changes being made in respondents' exceptions to the master's report herein, in which the title of this suit is given as "John G. Warner *vs.* The City of New Orleans."

2d. That found on page 148 of the record, stipulating that certain offerings of defendant should be omitted from the transcript for the appeal taken by respondents from the circuit court to the court of appeals of the fifth circuit, in which the following language (page 148) is used:

"It is agreed that in making up the transcript for the *appeal from the decree entered herein on the 26th day of March, 1900, in favor of the Warner heirs*, John Crossley & Sons, Limited, Wilder & Co., F. J. Gasquet, Suffolk National Bank, Mrs. F. N. Butler, Mrs. Mary E. Taliaferro, John J. Donaldson, and Mrs. Eliza J. Lytle, that the clerk may omit therefrom the following offerings by defendant:"

3d. That found on pages 152 and 153, stipulating that the petition, answer, and bill of costs, part of the claim of Wilder & Company, were duly offered in evidence before the master, in which said agreement the title of this suit is set out as "City of New Orleans, appellant, *vs.* John G. Warner *et als.*, appellees," and which is signed by the solicitors of respondents as "solicitors for appellees."

4th. The stipulation and agreement found on pages 155 and 156 of the record, to the effect that the certified copy of the transcript of the record of this cause, already at the making of said agreement on file in this court, should be taken and considered as a return to the writ of certiorari herein granted, in which said agreement the title of this cause is set out as "The City of New Orleans, appellant, *vs.* Ann Warner *et als.*, appellees," and which said agreement is signed by the solicitors for respondents as "attorneys for Ann Warner *et als.*"

26171

And considering further the order for the writ of certiorari, to be found on page 165 of the record, by which it is declared that the court is informed that there was pending in the court of appeals for the fifth circuit a suit "in which The City of New Orleans is appellant and Ann Warner, Joanna McCrossin, Mary E. Warner, and Harry Warner, sole heirs-at-law of John G. Warner, deceased, *et als.* are appellees;" and considering that all of said agreements and stipulations were executed and signed by solicitors for appellees long subsequently to the making of Ann Warner, Joanna McCrossin, Mary E. Warner, and Harry Warner, sole heirs of John G. Warner, deceased, parties to this suit in the place and stead of John G. Warner:

And considering further the decisions of this court in the cases of Bigler *vs.* Waller, 12 Wall., 143–148; Shepperd *vs.* Pepper, 133 U. S., 626–644, 645, and Edmunson *vs.* Bloomshire, 7 Wall., 306–311:

The said City of New Orleans moves that it be allowed to furnish a bond for its appeal herein taken from the circuit court of the United States for the eastern district of Louisiana to the court of appeals for the fifth circuit, in favor of Ann Warner, Joanna E. McCrossin, Mary E. Warner, Harry Warner, and John J. Donaldson, in such an amount as may be sufficient to respond to the costs incurred by the said parties and within such delay as the court may fix, the said bond to have all the effect as a bond filed and approved by the judge of said circuit court on the day the said appeal herein was taken, if, in the judgment of the court, the said appeal has not already been sufficiently taken, allowed, and perfected by the allowance of the appeal in open court by

the said circuit court by its order, found on page 149 of this record, and the filing and approval by the judge of said circuit court, found on pages 152 and 153 of the record.

FRANK B. THOMAS,
Assistant City Attorney.

BRANCH K. MILLER,
Solicitors for City of New Orleans.

Office Supreme Court, U.S.
FILED
DEC 5 1900
JAMES H. McKENNEY,
Clerk.

No. 281.

Acts of Louisiana.

Filed Dec. 5, 1900.

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS,

PETITIONER,

versus

ANN WARNER, ET ALS.,

RESPONDENTS.

Acts of the Legislature of Louisiana, Referred to in the Above Cause.

J. G. HAUSER, PRINTER, 402 CAMP STREET.

26174

ACT NO. 30.

AN ACT

To provide for the drainage of New Orleans.

WHEREAS, The proper and efficient drainage of the city of New Orleans is of paramount importance to the sanitary and commercial interests of the city, as also of the State of Louisiana; and whereas, the Mississippi and Mexican Gulf Ship Canal Company are prepared to immediately undertake the work with the only kind of machinery adapted thereto and now ready for use, and to prosecute the same with energy and economy to completion, therefore—

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the Mississippi and Mexican Gulf Ship Canal Company, a corporation now existing and domiciled in the city of New Orleans, be and is hereby authorized and empowered to excavate drainage canals and build protection levees within the present corporate limits of New Orleans and Carrollton, under the conditions and with the stipulations hereinafter expressed.

SEC. 2. *Be it further enacted, etc.,* That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig a canal, and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city of New Orleans, and near the shore of Lake Pontchartrain; the exact location of the said canal and levee, and of all canals dug and levees built by the said company, to be designated and fixed by the Board of City Administrators, and the title to the lands necessary for said works to be procured and held, for the benefit of the city of New Orleans, by the Board of Administrators of the city of New Orleans; the said lake shore canal to be not less than sixty-five feet wide on the surface, and fifteen feet deep in the middle, with proper slope of the sides, the said canal or canals along the lake shore to serve as a reservoir for draining the city of New Orleans and the lands in the rear of the city, the drainage to be pumped from the canal over into the lake, and the said protection levee to be not less than one hundred feet wide,

and of sufficient height to completely protect the city from overflow from Lake Pontchartrain.

SEC. 3. *Be it further enacted, etc.,* That said company shall also be authorized and empowered to excavate canals of the dimensions, and at such localities as may be fixed by the Board of Administrators of the city of New Orleans, which shall fully drain the area bounded by the protection levees herein contemplated and the Mississippi river, and connect with the drainage canals now located in the said area.

SEC. 4. *Be it further enacted, etc.,* That the said company shall also be empowered and authorized to build a canal and protection levee below the city of New Orleans to connect the lower end of the protection levee, along the lake, with the Mississippi, of a sufficient size to fully protect the city from overflow, and on a line to be designated by the Board of Administrators; and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by the said Board of Administrators; the object to these two canals and protection levees to be the protection from overflow of the areas between the Mississippi river and Lake Pontchartrain, above the New or company canal, and below the Carondelet canal.

SEC. 5. *Be it further enacted, etc.,* That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig all the smaller canals, required for the drainage of New Orleans and the lands in the rear of the said city, of the dimensions of ten feet or more than ten feet in width.

SEC. 6. *Be it further enacted, etc.,* That the Board of Administrators shall be required, and it is hereby made their duty, immediately after the passage of this act, to locate the lines of the canals and protection levees, specified in the various sections of this act, in time to prevent delay in the prosecution of the work on the part of the said company. The Board of Administrators are also required to build and run all the pumps and drainage machines necessary to lift the drainage water from the said canal or canals over into Lake Pontchartrain, and moreover to keep the water in the canals in process of excavation, so far as practicable, at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands; and should the City Council fail to locate the lines of said canals and protection levees above specified, the city of New Orleans is hereby made liable to the said company for the damages resulting from such delay.

26173

SEC. 7. *Be it further enacted, etc.,* That said Mississippi and Mexican Gulf Ship Canal Company shall be required to have ready for work, within fifteen days after the passage of this act, machinery of sufficient power to excavate at least twenty-five thousand (25,000) cubic yards per month, and to move the same the distance required to build the protection levee, and to increase as soon as practicable their machinery to the capacity of at least fifty thousand cubic yards per month.

SEC. 8. *Be it further enacted, etc.,* That at the end of every month it shall be the duty of the City Surveyor of New Orleans, or an engineer appointed, by the Board of Administrators for that purpose, to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company, during said month, and upon the measurement of the width and depth of the canal, canals or parts of canals dug, and protection levees built, certify as to the number of cubic yards excavated and the number of cubic yards of protection levees built during the said month. It shall be the duty of the Administrator of Accounts, on the presentation to him of the said certificate of the City Surveyor or engineer appointed by the Board of Administrators, by the President of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavation, and fifty (50) cents per cubic yard for the protection levee, the said warrants to be of such denomination as may be required by the President of the said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to indorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants.

SEC. 9. *Be it further enacted, etc.,* That in order to provide funds for the payment of the work to be done by the said company, the three boards of draining commissioners for the draining districts of Orleans and Jefferson, established under the acts of March 18, 1858, of March 17, 1859, and the several amendments thereto, and any and all other person, persons, or corpora-

tions, who may have them in possession, shall transfer to the Board of Administrators of New Orleans *all moneys, assessments and claims of drainage in their hands or under their control, all titles to real estate, all books, plans, tableaus, judgments in favor of commissioners, the office furniture of said drainage commissioners,* a true statement of the claims of said drainage commissioners against the city, to be adjudicated and settled out of the money collected by the city, and everything pertaining to said draining districts; that the Board of Administrators of New Orleans, be and are hereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of the several draining districts, or of any other corporation charged with the duty of drainage and leveeing within the limits of the city of New Orleans and Carrollton; that the Board of Administrators be and are hereby authorized and directed to collect from the holders of property within the said districts the balance due on the assessments, as shown by the books of the first, second and third drainage districts, under the acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, *which said assessments are hereby confirmed and made exigible, at such time and in such manner as the Board of Administrators may designate; provided, that the said board shall collect the assessments herein authorized in time to provide for the payment of the warrants to be issued to the said company at the date of their issue; also, to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under, and created by, the acts of March* 18, 1858, *and of March* 17, 1859, *and amendments thereto, and on such other lands as are brought within the protection levees contemplated by this act, where no assessments have been made; and to execute and enforce the same as provided for by the several acts of the Legislature, creating and regulating said boards of draining commissioners; provided,* that all money or moneys received by the said Board of Administrators from the said commissioners of the drainage districts, either from the sale of property received from the said commissioners, from the collection of claims for drainage now due, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, *be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with the provisions of this act; and that all*

property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage; and provided, further, that the rights, powers and faculties possessed and enjoyed by said Board of Administrators of New Orleans, relative to drainage, shall be so construed as not to conflict with the rights, powers and faculties acquired by the said company, in excavating canals and building levees, as stipulated in the various sections of this act.

SEC. 10. *Be it further enacted, etc.,* That all acts and parts of acts in conflict with, or inconsistent with the various provisions of this act, are hereby repealed, and especially the act entitled "An Act to repeal all laws and parts of laws creating drainage districts in certain portions of the parishes of Orleans, Jefferson," etc., passed March 2, 1869, generally known as the Ship Island canal bill; also, an act amendatory thereto, approved March 16, 1870.

SEC. 11. *Be it further enacted, etc.,* That it is hereby made the duty of the Board of Administrators to see that the parties whose duty it is to do the same, shall, immediately after the passage of this act, build such levees on both sides of the Carondelet canal, and the New, or Canal and Banking Company's canal, extending to Lake Pontchartrain and around their basins, as to effectually prevent the overflow of water from the said canals during storm, tides or high water in Lake Pontchartrain, the dimensions of said levees to be determined by the Board of Administrators.

SEC. 12. *Be it further enacted, etc.,* That this act shall be favorably construed, so as to favor all the purposes and objects of the same, and the operations of the provisions thereof, and shall take effect from and after its passage.

(Signed) GEO. W. CARTER,
Speaker of the House of Representatives.
(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

A true copy:

GEO. E. BOVEE,
Secretary of State.

The foregoing act, received in my office, February 24, 1871, having been presented to the Governor of the State of Louisiana

for his approval, and not having been returned by him to the House of the General Assembly in which it originated, within the time prescribed by the Constitution of the State of Louisiana, has become a law without his approval.

GEO. E. BOVEE,
Secretary of State.

ACT NO. 16.

AN ACT.

To authorize the City of New Orleans to assume exclusive control of all drainage works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company, and its transferee; and to provide for the manner of making said purchase and for paying therefor in drainage warrants.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That the Common Council of the City of New Orleans is hereby authorized and empowered to transact and contract with the Mississippi and Mexican Gulf Ship Canal Company, and the transferee thereof, for the purchase and settlement of all or any rights, franchises, and privileges created, authorized, or arising in favor of said company or said transferee under and by virtue of Act No. 30 of Acts of 1871; also for the purchase and transfer to the City of New Orleans of all tools, implements, machines, boats and apparatus belonging to said company or its transferee, and by it or him used for or pertaining to drainage work authorized to be done by said Act No. 30.

SEC. 2. *Be it further enacted, etc.,* That should it be deemed advisable by said Council to make said purchase and settlement it shall be the duty of said Council of the City of New Orleans to provide by ordinance for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance.

SEC. 3. *Be it further enacted, etc.,* That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the City of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the trans-

26177

feree of the said company under Act No. 30 of Acts of 1871 for work done. They shall be made payable out of the drainage assessments, and shall be issued as soon as any agreement shall have been completed.

SEC. 4. *Be it further enacted, etc.,* That whenever the sale and purchase contemplated by this act shall be completed and the drainage warrants issued in payment of the price agreed on and fixed, the City of New Orleans, through its officers, shall have exclusive control of all the rights, powers and franchises granted by Act No. 30 of Acts of 1871 relative to drainage or other public works to the Mississippi and Mexican Gulf Ship Canal Company or its transferee; the City of New Orleans shall alone have the power, either through its own officers and employees or by contract to the lowest bidder, to do all canalling, dredging, ditching, or drainage work required to be paid for by assessment upon property or from the city treasury.

SEC. 5. *Be it further enacted, etc.,* That hereafter the City Council shall fix the dimensions of all canal excavations and protection levees required for the City of New Orleans.

SEC. 6. *Be it further enacted, etc.,* That all laws and parts of laws in conflict with the provisions of this act or inconsistent therewith be and are hereby repealed, and that this act take effect from and after its passage.

(Signed) E. D. ESTILETTE,
Speaker of the House of Representatives.
(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved February 24, 1876.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
P. G. DESLONDE,
Secretary of State.

26180

United States Supreme Court,

OCTOBER TERM, 1899.

No. ———.

CITY OF NEW ORLEANS—A MUNICIPAL CORPORATION,

PETITIONER,

versus

JOHN G. WARNER, ET ALS.,

RESPONDENTS.

Now comes the respondents in the above entitled proceeding, and for answer to the petition of the City of New Orleans praying for a writ of *certiorari*, say:

I.

That the statement of the proceedings had in the suit of John G. Warner, *et als., versus* The City of New Orleans, in the Circuit Court of the United States for the Eastern District of Louisiana, and in the United States Circuit Court of Appeals, as set forth in said petition, is substantially true, save and except that the said petitioner has omitted to state the fact that the appeal of the city from the said decree of the Circuit Court in favor of these respondents, dated March 26, 1900, was al-

lowed, and taken to the said Court of Appeals, *without a supersedeas,* as appears from the order of the Circuit Court granting said appeal (present record, p. 68); the said city of New Orleans having given bond for costs only, but without any stipulation securing the amount of said decree, as required by law, to suspend execution. And so respondents submit that if a writ of *certiorari* is granted herein, it should be expressly provided that the granting of the writ shall not operate to suspend or delay the execution of the said decree of March 26, 1900, unless the said petitioner shall give security for the principal and interest due respondents under said decree, now amounting to the sum of, say $791,000.

II.

These respondents deny that the master erred in allowing the claims of the holders of the warrants issued under the agreement of sale and compromise made between the City of New Orleans and the Mexican Gulf Ship Island Canal Company and Warner Van Norden, transferee, all of said warrants being of the same kind and class, and issued upon the same consideration as those held by John G. Warner, complainant, in the original suit; and they deny that the Circuit Court erred in overruling the exceptions to the master's report and in making the decree of March 26, 1900, or that the United States Circuit Court of Appeals erred in affirming said decree. And respondents specially aver that in allowing the claims of the warrant holders, the master strictly followed, as it was his duty to do, the requirements of the decree of December 5, 1898, as affirmed by this Honorable Court in the case of the City of New Orleans vs. John G. Warner, 175 U. S., 120; 176 U. S., p. 92.

III.

Respondents further submit that the City of New Orleans having been fully heard upon all the numerous defenses set up in its answer to the original bill of the said Warner, filed in behalf of himself and your respondents, holding the same class of warrants, should not now be permitted to set up other and

26181

further defenses before the master, impeacing the decree of December 5, 1898, affirmed by this Court, under which the master proceeded. Respondents are advised, in this connection, that neither the Master, nor the Circuit Court, nor the Court of Appeals, could lawfully disregard the decision of this Court, and deny to warrant holders the right to claim the benefit of said decree. And they further suggest that, according to settled practice and usage, this Court will not itself review, reverse, or modify its own decrees upon a second appeal.

Wherefore respondents pray that the application of the petitioner, the City of New Orleans, for a writ of *certiorari* be denied, with costs; but that in case this Honorable Court is pleased to allow said writ, it be expressly ordered that the allowance shall not suspend the execution of the decree sought to be reviewed, unless the petitioner shall give security for the amount due respondents thereunder, in principal and interest, now amounting to $791,000.

Respectfully submitted,

R. DEGRAY,
J. D. ROUSE,
WM. GRANT,
Solicitors for Respondents.

William Grant, being duly sworn, says that he is one of the solicitors for the respondents in this cause, and that the statements contained in the foregoing answer are true, to his own knowledge.

WM. GRANT.

Subscribed and sworn to before me this.....day of May, 1900.

.....,
Notary Public.

Brief in Support of the Foregoing Answer.

I.

Repeating briefly the statement of facts made in the case of the City of New Orleans vs. John G. Warner, 175 U. S., 120, it appears that by a solemn agreement executed before G. LeGardeur, notary, on the 7th day of June, 1876, the City of New Orleans purchased from the Mexican Gulf Ship Island Canal Company, and Warner Van Norden, its transferee, the plant and franchises of the Canal Company, and by the same act compromised certain claims held by Van Norden for damages, and for misappropriation of certain drainage taxes. Under this agreement the city acquired the property and franchises of the Canal Company, and its transferee, and obtained a discharge of their claim for damages; and Van Norden, transferee of the Canal Company, received warrants payable out of drainage assessments to the amount of $320,000 in discharge of the consideration. These warrants were for various sums, and were numbered from 393 to 402 inclusive. John G. Warner brought suit on this agreement as holder of three of these warrants, numbered respectively 379, 380, 381, for $2,000 each. The bill was brought by the complainant in his own interest, and in behalf of all other holders of the warrants issued in discharge of the consideration of the agreement. It was dismissed by the Circuit Court on demurer, but the decree of dismissal was subsequently reversed by the Circuit Court of Appeals upon the advice of this Honorable Court, given in Warner vs. New Orleans, 167 U. S., 467. The city then answered the bill, and upon the merits the Circuit Court again dismissed the bill, but its decree was reversed by the Court of Appeals, which directed the Circuit Court to enter a decree in the following form:

"This cause came on to be heard on the transcript of the record in the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this Court that the decree of said Circuit Court

in this cause be, and the same is hereby, reversed, and this cause remanded to said Circuit Court with instructions to enter a decree as follows, to-wit:

1. It is decreed that the City of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 per cent. interest thereon from June 6, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the City of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of Act No. 16 of the Legislature of the State of Louisiana, approved February 24, 1876.

3. That it be referred to one of the masters of the Court to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment rolls and other records appertaining to such drainage assessments by any person having possession thereof, and to examine witnesses touching all such matters.

In taking and stating said account, the master is directed to charge the defendant as well with the amount of drainage assessments against the city on the areas of the streets, squares, and public places, as with those against the owners of private property with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice, by advertisement in a newspaper published in the City of New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims.

And it is further ordered that said warrant holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions, or

to obtain special leave of the Court, and that they be entitled, upon making satisfactory proof, to the full benefit of the proceeding.

5. It is further decreed that upon the coming in of the master's report, and its confirmation, the complainant and all those who have established their claims under the fourth clause of the decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then for the proper pro rata thereof, and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interest have leave to apply to the Court for such other and further orders as may be necessary, from time to time, to carry this decree into full effect, and that the defendant pay all costs of this suit.

It is further decreed that the defendant, the City of New Orleans, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of said Circuit Court."

This decree of the Circuit Court of Appeals was reviewed by this court upon a writ of *certiorari*, and affirmed in New Orleans vs. Warner, 175 U. S., 120; 176 U. S., p. 92. Under this decree, thus affirmed, the holders of the warrants of the same kind and class as those owned by Warner, issued in discharge of the consideration of the said agreement, filed their claims with the master.

The master allowed all the warrants so presented, and made due report of his findings, to which exceptions were filed by the City of New Orleans. These expections admitted that the city was indebted for warrants issued in payment of the price of the tangible property purchased under the agreement, amounting to $153,750, but alleged that the balance of the warrants issued in payment of the compromise for damages and misappropriation of drainage taxes, and for the franchises of the Canal Company, amounting to $146,250, were void because the city was not authorized by the act of February 24, 1876, to issue warrants for those purposes. The master overrruled the exceptions, holding that the above decree of December 5, 1898, was

final and conclusive, both as to Warner and the other warrant-holders who had come in and accepted the benefit of the proceeding; and also holding that if it were an open question the said act of 1876 sufficiently authorized the city to purchase the franchises and to compromise the claims for damages, etc. The rulings of the master were sustained by the Circuit Court and by the Court of Appeals.

This Court is now asked to review these rulings of the master. Although the assignments of errror are numerous, the substantial question to be considered is whether the master erred in following the decree of reference which this Court has affirmed in its late decision.

The brief of the present petitioner in support of its former petition for *certiorari*, on page 6 thereof, contained the following remarkable agrument and promise, which becomes still more noticeable in veiw of the present application and is demonstrative of the value of its good faith, viz:—

> "The case, in its public aspect, is a subject of large and important interest to the inhabitants of one of the largest cities of the Union, and its final determination is awaited with anxiety by many thousands of persons who will be subject to its effects; and it is hoped that this court will see the way clear for the exercise of its supervisory jurisdiction invoked by defendant. The petitioner is the more earnest in this hope by its knowledge, that the final determination by this Court of a controversy which has been pending for many years, will be respected and cheerfully acquiesced in, by reason of the respect for, and confidence reposed in this tribunal by all good citizens."

The application now made shows how "cheerfully" the city has fulfilled its promise to "acquiesce" in the decision of this Court.

II.

We submit that the decree of the Circuit Court of December 5, 1898, copied in the foregoing statement, which this Court affirmed in the case of New Orleans vs. Warner, 175 U. S., 120, and 176, p. 92, was a decree not only in favor of John G. War-

ner, adjudging the validity of the agreement, and of all the warrants issued under it, as a unit, but was a decree also in favor of the holders of all warrants of the same class in whose behalf the bill was brought. Decrees in cases of this character are generally treated as decrees in favor of all creditors who come in and claim the benefit of them. So the Courts of Chancery, both in this country and in England, where several creditors' bills are pending against the same debtor, will allow the case in which a decree is first rendered to proceed, and enjoin others. Says the Court in Hammond vs. Hammond, 2 Bland (Md.), 362. "The principle upon which an injunction rests in such cases is that, substantially, a bill by a creditor in behalf of himself and all others, or a suit by any one, in which all the creditors may be represented, and allowed to come in to obtain satisfaction, is considered as making all of them parties to it, and that the decree is in the nature of a judgment for them all."

Brooks vs. Gibbons, 4 Paige, 374.

Thompson vs. Brown, 4 Johns, ch. 619.

We admit that the claims of creditors submitted to the master in cases of this character may be inquired into, but the inquiry, we submit, must me limited to special defences not affecting the claim of the complaining creditor, and to defences such as payment, etc., not covered by the decree. In the present case Warner's bill was brought to enforce the provisions of the agreement, in favor of himself and all the holders of warrants issued in discharge of its consideration. The city in its answer made numerous defences, one being that the agreement was a fraud on the city, and therefore void, but it did not pretend to deny its authority to make the agreement and issue the compromise warrants, under the Act of February 24, 1876. The Circuit Court of Appeals rendered a decree against the city on all its defences, maintaining the validity of the agreement and of the warrants held by Warner, issued under it. It authorized all holders of the same class of warrants issued under the same agreement to make proof of their claims before the

master, and upon making proof of their claims decreed that they be entitled to the full benefit of the proceeding, and further decreed that all those who had established their claims should be entitled to absolute judgments against the city for the amount of the warrants held by them. This is the decree which this Court affirmed in New Orleans vs. Warner, 175 U. S., 120, and which the master obeyed to the letter in hearing the reference. In such cases the settled rule is that where a master, on a reference, has followed the order of the judgment and pursuant to its directions, no objections can be taken on appeal to what he has done, when the appeal arises, as it does here, upon exceptions to his report.

New Orleans vs. Gaines, 15 Wall, 624.

The order under which the master acts is the law of the case, and so long as it remains in force he can commit no error in following it. The remedy of a party dissatisfied with the order of reference is to apply to the Court to have it modified or set aside. In the present case, however, the Circuit Court was without jurisdiction or power to set aside or change the decretal order of reference for any purpose, because the decree had been affirmed by this Court in New Orleans vs. Warner, 175 U. S., 120. Indeed, according to the course of practice, this Court would not then have modified the decree if application had beeen made to it, either directly, or by a second appeal, for it is a well settled and long established rule that whatever has beeen decided by an Appelate Court, cannot in the same suit and in the same Appelate Court be re-examined.

Chaffin vs. Taylor, 116 U. S., 567.

Supervisors vs. Kennecott, 94 U. S., 498.

III.

But suppose we are mistaken, and that the matter of the issue of said drainage warrants is still open for inquiry, then we say the sole contention of the defendant is that there was no authority in the act of the Legislature which authorized the city to issue drainage warrants, to issue them for more than $153,-

750.00, the value of the dredge boats, the derricks and other property having a physical existence, and that the entire balance of said issue of the $300,000 issued for the plant, franchise, to pay claims for damages, etc., and the $20,000 issued in compromise and satisfaction of drainage taxes collected by the defendant and diverted from the trust fund, is absolutely null, and especially those issued in satisfaction of the claim for damages and franchise rights, because there was no appraisement of the property or rights for which they were issued, and hence all except said $153,750.00 issued under said bill of sale are void. There are many answers to this contention, and among them the following, viz:

"First.—This same argument was made without avail in this Honorable Court when the case was here on *certiorari* before, to which the Court responded as follows:

"These warrants were to be issued not only in payment of the drainage plant, but in settlement of Van Norden's claims against the city for damages connected with the failure of the city to carry out the contract with the Canal Company, and Van Norden, which, in view of the fact that the drainage plant had been purchased by him for $50,000.00 may be assumed to have been the greater part of the consideration." New Orleans vs. Warner, 175 U. S., p. 144.

And here it is to be noted that such a claim was specially provided for in the 6th section of Act 30 of 1871, which declared as follows:

> "That the Board of Administrators shall be required, and it is hereby made their duty, immediately after the passage of this act, to locate the lines of the canals and protection levees specified in the various sections of this act in time to prevent delay in the prosecution of the work of said company, * * * and should the City Council fail to locate the lines of said canals and protection levees above specified, the City of New Orleans is hereby made liable to said company for the damages resulting from such delay."

The Court further said:

> "It is scarcely necessary to say the fact that the city chose to pay $300,000, in 1876, for the property which Van Norden bought, in 1872, from the Ship Canal Com-

pany for $50,000, is not one which can be considered here. The act of 1876 authorizing the purchase and settlement of claims against the city, provided for the appointment of an appraiser to estimate the value of the rights and things to be purchased or settled for. This appraiser was appointed, and appraised the dredge boats and machinery at $153,750, being twenty-five per cent. less than the original cost. He announced himself unable to come to a conclusion with reference to the damages claimed. It must be borne in mind that the consideration of $300,000 was fixed upon not only to cover the value of the property of the plant, but the exclusive franchise under the act of 1871, and the claims for damages against the city." Warner vs. New Orleans, 175 U. S., p. 145.

Second.—But suppose we are still mistaken, then we say the City of New Orleans, as against the present holders (third parties), is estopped to deny any regularity or want of consideration in the issue of said warrants beyond the $153,750 admitted to be valid and binding, because all of said warrants are in the precise form provided by the statute. They were issued and signed by the officers designated in said statute, and they recite on their face that they were issued in accordance with the provisions of Act No. 30 of the General Assembly of the State of Louisiana, held in the year 1871, etc., thus complying with said Act No. 16 of 1876, which provided that they should be issued in the same form and manner as those heretofore issued under said Act 30 of 1871 for work done. Bearing such recitation on their face, and there being no pretence of want of legislative authority to the city to make the compromise for which any and all of the warrants were given, they are valid in the hands of the present owners.

And especially so, because, neither in the appointment of the appraiser nor in the assignment of his duties and powers (as we will show hereafter) had the Canal Company nor Van Norden any voice whatever. In fact the pretended complaint of the city now is that she failed to do her duty in the mode of arriving at the result concluded in the act of sale and compromise pursuant to which the drainage warrants were issued, and hence

because of her own, now for the first time alleged direliction of duty, she must not pay for what she then received, but must retain all benefits, that by her own faults, she acquired. This she cannot do.

Third.—But suppose we are still mistaken, and that the city now has, as against a third holder and owner for value, the right to inquire, after a lapse of twenty-four years from the time of receiving the property transferrred, and without restoring the *statu quo,* and in fact without being able to do so, whether all the details which should have been observed by the city had been so observed, to ascertain what warrants were valid, then we say such inquiry will utterly fail to avail the city in the defence of this case.

The contention is that as there was no appraisement beyond the dredge boats, etc., the warrants issued beyond the value reported by the appraiser are null, but the law in reference to said appraisement will not support the contention. The clause in question is the 2nd section of said act of 24th February, 1876, which reads thus:

> "That should it be deemed advisable by the said Council to make said purchase and settlement, it shall be the duty of said Council of the City of New Orleans to provide, by ordinance, for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance."

Clearly this law does not provide, nor does it mean, that the only sum to be paid, is to be the sum or amount found by the appraisers. Such a construction would nullify the entire purpose of the act, and would be destructive of the purpose of the act itself, which was to authorize the city to transact (compromise) and contract for the rights, franchise, claims, etc., of the Canal Company and Van Norden. This is made very clear by the last part of said section which declares, "the duties and powers of said appraisers shall be specifically assigned in said ordinance," showing he was entirely subject to the direction of the Council.

In other words, the appraisement was not to fix the price, but to assist the Council, by the appraisement, to arrive at a proper price to be paid. In other words, this provision was directory, and not imperative. See Endlich on the Interpretation of Statutes, Section 436, 437 and 433, 21 Mass., p. 67.

Such was the view of the Council on the subject, for the authority of and the instruction to the appraiser is thus given in Ordinance No. 3,479, found on page 104 of Record No. 640, October Term, 1898; No. 172, October Term, 1899.

> "Be it ordained, That in accordance with the provisions of Act No. 16, approved February 24, 1876, Thomas S. Hardie, city surveyor, be and he is hereby authorized and instructed to make a thorough examination of the condition and value of all the dredge boats, machinery, tools and appurtenances belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavating of canals or building protection levees, making a report to the committee of the whole, together with a statement of all information in the possession of his office, concerning damages claimed by said Mississippi and Mexican Gulf Ship Canal Company, or the transferee thereof."

He was authorized and instructed to make examination of the condition and value of the dredge boats, machinery, etc., and to make report to the committee of the whole, together with a statement of all information in his office (city surveyor), concerning the damages claimed, and for what purpose? To the end that the matter of the price and value of the things to be setttled and paid for might be properly discussed by the committee of the whole Council with said company and its transferee, and a price arrived at, and even after said committee had been informed as to the value, still it was entirely discretionary whether said amount should be paid. His report is full, and was considered by the commmittee of the whole Council before it a ted.

The above ordinance does not provide for a report on the value of the contract or franchise of the company and its trans-

feree, for that was a matter in which the services of an appraiser were unnecessary.

The contract was fixed by Act 30, of 1871, of the Legislature of the State, and from its inception to the time of the execution of the bill of sale, had been carried on under the supervision of the city herself, and she, by her Council or committee of the whole, knew more about its value or what should be paid for it than any appraiser could furnish.

And surely it was not necessary to have an appraisement of the $24,000 cash, collected by the city, diverted from the fund from which it belonged, and applied to general fund purposes, to fix its value, for it was cash. Perhaps the only surprising thing about this is, that Van Norden should consent to compromise such a claim for drainage warrants, but this is fully explained by a reference to Section 3 of said act which provided, as heretofore shown, that all sums agreed upon should be paid in drainage warrants. In other words, it was to take this form of payment, or not compromise at all.

Surely there can be no doubt that among the rights which belonged to the Canal Company (and its transferee after the transfer to him by said company) was the right to have all drainage tax collections placed to the credit of said company and said transferee, as a trust fund to be used solely for the purpose of drainage. This was expressly declared by Section 9, of said Act No. 30, of 1871, which after providing for the transfer of all assesssments, money, property and judgments from the former drainage commissioners to the Board of Administrators of the city and the imposition of further assessments where none had yet been levied, provided in the latter part of said section:

> "That all money or moneys received by the said Board of Administrators from said commissioners of the drainage districts, either from the sale of property received from said commmisssioners, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, be placed to the credit of the Mississippi and Mexican Ship Canal Company, and held as a fund to be applied only to the

drainage of New Orleans and Carrollton, in accordance with the provisions of this act."

The uncontradicted evidence shows, that with this legal obligation on the city, she had collected the above $24,000 of drainage taxes which she had not deposited as required by said obligation, but had appropriated it to the general use of the city (See page 52, of the Present Record, which shows warrrants No. 393 to 404, inclusive, issued in satisfaction of the sum so misappropriated). In fact the evidence in the case shows the sum actually received by the city was $26,727.90. See suit of Commissioners of New Orleans Park vs. The City of New Orleans, pages 230 to 238 and especially page 238 Supreme Court Record No. 640, October term, 1898, and No. 172 of 1899. Deposition of Rabouin, same record, p. 314. Deposition of Butler, same record, p. 317.

IV.

It is very clear from the whole case, from the act of the Legislature authorizing the city to transact (compromise) and contract with the Canal Company and Van Norden, from the acts of the parties themselves as crystalized in the bill of sale of June 7, 1876, that there was not only a purchase of the physical property of the company and its transferee, but also a compromise and settlement of all the claims between the parties. Such a transaction, under the laws of Louisiana, has the force and effect of *res adjudicata* (Civil Code, Articles 3071, 3075). In speaking on this subject the Supreme Court of the United States in Oglesby vs. Attrill, 105 U. S. R., page 611, said:

> "The compromise stands, therefore, as a judgment, making a settlement of the very matters now set up as grounds of complaint in the petition on reconvention; that is, 'the frauds and machinations of the officers of the company' in levying the assessments. It settled all claims arising from the assessment, and the alleged fraudulent purposes of the officers in connection with it. Though made directly with the company, and the defendant, it protests from further suit those who advised, equally with those who levied, the assessment; participants in whatever

wrong was committen, if any there were, as well as principles; abettors as well as doers of it. No allegations of fraud, in addition to those made at the setttlement, can prevent the compromise from having effect as a judgment thereon. It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally. *Adler vs. Prudholme*, 16 La. Ann., 343."

We think the decree complained of is clearly right, that it is based squarely upon the matters already decided in this case, and that the writ prayed for should be denied with costs; and thus believing, we will conclude, with a substitution of names only, in the language of this Honorable Court, in Gaines vs. New Orleans, 6 Wall, 718. "Can we not indulge the hope that the rights of 'drainage warrant holders' will now be recognized?"

Respectfully submitted,

RICHARD DEGRAY,
J. D. ROUSE,
WILLIAM GRANT,
Solicitors for Appellees.

26189

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS,
PETITIONER.

versus

ANN WARNER, ET ALS.,
RESPONDENTS.

Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

BRIEF FOR RESPONDENTS.

STATEMENT.

This is the New Orleans drainage case, and facts therein, prior to the matters involved in the present review, have been so frequently stated by the Court, in Warner vs. New Orleans, 167 U. S., p. 467, and in New Orleans vs. Warner, 175 U. S., p. 120, that a repetition thereof would be unnecessary, and hence we will only notice what has transpired since the case was before this Court the last time, as reported in 175 U. S., pp. 120 and 176;

U. S., p. 92. Upon filing the mandate of this Honorable Court in the Circuit Court (R. p. 99), the decree of the Circuit Court of Appeals was duly entered in said Circuit Court and the case was referred to a master in accordance with the directions therein contained (R. p. 93), and after due proceedings had, said master found that the following named parties had proved their claims for the following amounts (R. pp. 102 to 106):

John Crosseley & Sons, Limited	$149,000 00
Wilder & Company	7,000 00
F. J. Gasquet	30,000 00
Suffolk National Bank, of Boston	60,000 00
Mrs. Frank N. Butler and Mary E. Taliferro	5,000 00
John J. Donaldson	2,000 00
Mrs. Eliza J. Lytle, dative tutor	12,000 00
John G. Warner, Ann Warner, *et als.*, substituted, complainants	6,000 00
James Jackson	45,000 00

The master having come to this conclusion drafted his report and exhibited the same to all parties in interest, to which the only exception filed, or objections made, were those of defendant, a copy of which are to be found on page 39 of the appendix of this brief, as well as at page 108 of the record herein.

These exceptions were duly considered by the master, and disposed of in a supplemental report (R. pp. 106 to 108), who overruled the same, adhered to the conclusions as expressed in his report as first drafted and exhibited, and returned said reports into Court, together with all the proceedings had and evidence adduced before him (R. pp. 109 to 143).

Thereafter the defendant filed the same exceptions to said master's report in the Circuit Court (a copy of which is to be found on page 40 of the appendix to this brief, also at page 143 of record), which, by agreement of counsel (R. p. 145), were corrected as to the allegation in reference to $20,000.00 of warrants therein stated to have been issued "in payment of work done by Van Norden," so as to allege that the same were issued

"in satisfaction of that amount of drainage taxes collected by the City of New Orleans prior to June 6, 1876, and applied to general fund purposes," the allegation in the exception as filed before the master, and as filed in the clerk's office (R. p. 108), being:

> "That of said warrants, the sum of $20,000.00 were issued, as will appear by the express terms of the said act, in payment of work which had been done by the said Van Norden; that is, digging canals and building levees, which at the time of the passage of the said act had not been surveyed or measured by the city surveyor."

While the allegation, as corrected, and as it was argued to the Court (R. p. 144) was:

> "That of said warrants, besides those issued in settlement of said claim for damages, the sum of $20,000.00 were issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the City of New Orleans prior to June 6, 1876, and applied to general fund purposes, and hence, as to these warrants, there could be no recovery or allowance made."

But these exceptions, filed in the clerk's office, by their express terms, only apply to the intervenors and not to complainant, and contain no prayer for any relief whatever.

After argument and due consideration by the Court, said exceptions were overruled, the master's report was approved and confirmed and judgment was rendered in favor of the parties named by said master for the respective amounts by him reported as aforesaid, with 8 per cent. interest per annum from June 6th, 1876, until paid, except James Jackson, as to whom further action were reserved (R. p. 145).

From this an appeal was asked, accompanied with an assignment of error (a copy of which is found at page 42 of the appendix hereto), and was allowed, without *supersedeas*, to the United States Circuit Court of Appeals (R. pp. 149 to 152), but no appeal was ever effected or completed as to John J. Donaldson, one of the intervenors in whose favor there was judgment of $2,000.00 with interest at 8 per cent. per annum from June 6,

1876, and costs; as to whom no appeal bond was ever given in the Circuit Court, nor was any attempt ever made in the United States Circuit Court of Appeals to supply this omission by furnishing a new bond; and as to whose judgment there never was any complaint by any application for the writ of *certiorari* herein. This will more fully appear by reference to page 80 of the record herein, where the petition for said writ twice gives the names of the parties against whom it is filed, and among them the name of Donaldson does not appear. The decree of the Circuit Court as to said Donaldson, neither complained of by appeal to the Circuit Court of Appeals, nor by petition for writ of *certiorari* herein is, therefore, beyond examination or review herein.

The italics in said copy of said assignment of error, in said appendix hereto, are not in the original filed by the defendant on taking said appeal to the United States Circuit Court of Appeals, but are made by counsel to call attention to the difference between the matters set forth in the exceptions presented to the master and those filed to the master's report in the Circuit Court on one hand, and an attempt to raise and have decided, on appeal, matters never raised before either the master or before the Circuit Court, as to the appraisement of the claim for damages and moneys misappropriated, but this will be discussed hereafter.

Argument.

I.

We had supposed—and we still believe—that notwithstanding the contention to the contrary, and notwithstanding the fact that each and all of the mythical, visionary, so-called points of the other side have not, in detail, been noticed by this Court, that something has been decided in this case. We believe it has been judicially determined by the United States Circuit Court of Appeals and by this Honorable Court, although it did not, *seriatim*, and in detail, notice in its exhaustive opinion, in the 175

U. S. p. 120; 176 U. S. R. p. 92, each of the nineteen so-called errors; that all matters thought to be embraced therein, whether of substance or of vision, as well as any and all others that might or could be raised, have been decided; that it has been decided that the notarial act of June 7, 1876, under which the drainage warrants therein mentioned were issued, whether the same be called for the purposes of abbreviation and convenience, by counsel in their arguments, or by the Courts in their opinions, an act of sale, or of purchase, or transfer, or of compromise, was, in all things legal and valid; that for the considerations therein named, the Canal Company and Van Norden, its transferee, transferred and conveyed to the defendant the dredgeboats and paraphernalia therein named; that it settled Van Norden's claim for damages therein stated; that it effectually terminated what the defendant had always asserted to be a most onerous contract on its part for the draining and reclaiming the lands therein embraced, and that it compromised for $20,000.00 in drainage warrants, $24,000.00 if not $26,000.00 of cash collected by the defendant and by it most wrongfully diverted from the drainage fund to which it belonged, and that each and all of the drainage warrants issued under said notarial act were and are legal and valid obligations of the defendant.

That under said notarial act the city legally acquired the dredgeboats, machinery and appliances, and is liable to the extent of $153,750.00 of the drainage warrants issued under said notarial act is not denied, but is in fact admitted as late as the present application for the writ of *certiorari* herein.

That the city settled Van Norden's claim for damages was a matter set forth in the bill of complaint (R. p. 10) in said notarial act, which was annexed to and made part of said bill (R. pp. 10, 36 and 39), and was admitted in defendant's answer (R. p. 24); the allegations in said bill, in said notarial act and in said answer being as follows:

The bill, at page 10, paragraph 14, alleged:

"14. * * * That by Act No. 16 of the Legislature

of Louisiana, * * * made part hereof, the City of New Orleans was authorized and empowered to contract with the said * * * Canal Company and said Van Norden, as transferee thereof, for the purchase of its transferee's *rights,* franchises, tools, implements, machines, boats and apparatus, * * * and after due appraisement, on the 6th day of June, 1876, said purchase was made by said city by notarial act, a copy of which as well as of an inventory of the property sold and the ordinance under which said inventory was made, are hereto annexed and made part hereof and marked transfer I, inventory 1, and ordinance to 3479, A. S. ——" etc.

And said notarial act declared (R. p. 37) that said * * * Canal Company and said Van Norden, its transferee and pledgee—

"Do, by these presents, grant, bargain, sell, convey, transfer, assign and set over and unto the City of New Orleans * * * *all* and singular, the rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages which said * * * Canal Company has or may have under and by virtue of said Act 30 * * * and all other acts of the Legislature of this State," etc.

Then follows the recital of the sale of the dredgeboats by said Van Norden, individually, to said city, all of which said act declared said city was—

"To have and hold the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of said * * * Canal Company and said Van Norden, transferee and pledgee, * * * unto the said City of New Orleans forever, by virtue of these presents."

After subrogating said city to all the rights, actions and remedies of said grantors, and declaring that—

"The sale of the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages * * * are made and accepted for and in consideration of the price and sum of three hundred thousand ($300,000) dollars, payable in drainage warrants."

Said notarial act (at page 39), further declared that said sum

was in full settlement of all claims for damages (although it has again and again been denied orally, and in printed arguments, that in said notarial act there was any reference to the settlement of any claim for damages) in the following unmistakable and sweeping language:

> "And the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and the said W. Van Norden, as transferee and pledgee, aforesaid, and in his own name individually, declared that they have covenanted and agreed, and do, by these presents, covenant and agree, that the said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden, in consideration of the sales herein made, and also in full settlement of all existing claims for damages which the * * * Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name individually, ever had, or have now, or may have, against the said City of New Orleans."

And said notarial act annexed to and made part of the bill of complaint as aforesaid, at page 41, further declared:

> "That inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said City of New Orleans will issue to the said Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same."

And the defendant's answer in response to the bill of complaint, with the said notarial act annexed as part thereof, (at page 24,) admitted the acquisition by the city of all in said act set forth as follows:

> "And further answering this defendant says, that in 1876, * * * by Act No. 16 of that year was constrained to dispense with the services of the company and its assignee, and to authorize the purchase by this defendant of the dredgeboats, rights, franchises and other property of the company for a price in drainage warrants delivered to Warner Van Norden, the said assignee, payable only from drainage taxes, and this act was followed by the purchase from

and surrender of the said franchises by said company and its assignee, as shown by said legislative act, and act of purchase, a copy of which is filed with the bill, to which reference is made."

This notarial act thus alleged and made part of and filed with the bill with the full effect of all the recitations, covenants, transfers, conveyances and settlements therein contained, and thus admitted in the defendant's answer, was, without opposition, offered in evidence (R. 172, Oct. Term of 1899, p. 206; No. 19, referable to and usable under 10th article of agreement of solicitors herein, found at page 167 of the present Record), as well as the three drainage warrants of complainant Warner, of $2,000.00 each (No. 172, Oct. T. 1899, p. 205), issued under said notarial act. On these allegations of the bill, on the answer of the defendant thereto and on the proofs offered, the following decree was rendered by the United States Circuit Court of Appeals (R. p. 95 and 96):

"This cause came on to be heard on the transcript of the Record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

"On consideration whereof, it is now ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed and this cause remanded to said Circuit Court with instructions to enter a decree as follows, to-wit:

"1. It is ordered that the City of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6000, with 8 per cent. interest thereon, from June 6, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

"2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the City of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to

said city under authority of Act No. 16 of the Legislature of the State of Louisiana, approved February 24, 1876.

"That it be referred to one of the masters of the Court to take and state an account of all of said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments by any person having possession thereof, and to examine witnesses touching all such matters.

"In taking and stating said account, the master is directed to charge the defendant as well with the amount of drainage assessments against the city on the areas of the streets, squares, and public places as with those against the owners of private property, with interest thereon, as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in execution of the trust, but that no offset be allowed for bonds issued in exchange for drainage warrants under the Act of 1872.

"4. It is further ordered, that said master give thirty days' notice by advertisement in a newspaper published in the City of New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims.

"And it is further ordered, that said warrant holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions or to obtain special leave of the Court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

"5. It is further decreed, that upon the coming in of the master's report and its confirmation, the complainant and all those who have established their claims under the fourth clause of this decree, will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then for the proper *pro rata* thereof, and shall be entitled to have execution therefor.

"It is further ordered, that complainant and all other parties in interest have leave to apply to the Court for such other and further orders as may be necessary from time to

time to carry this decree into full effect, and that defendant pay all costs of this suit.

"It is further decreed, that the defendant, the City of New Orleans, be condemned to pay the costs of this cause in this Court, for which execution may issue out of said Circuit Court."

And this decree was in "all respects affirmed" by the Supreme Court of the United States, 175 U. S. p. 120; 176 U. S. p. 92; and the mandate of said Supreme Court ordered that the cause be remanded to the Circuit Court, with a direction to comply with the decree of said Circuit Court of Appeals (R. p. 101).

In short, this decree, thus affirmed and ordered to be complied with, provided as follows:

1st. Judgment for Warner for $6000, payable out of drainage assessments.

2nd. That said assessments were a trust fund for the payment of said Warner, and other holders of warrants, issued under the act of sale from Van Norden and the Canal Company to the City of New Orleans, made under the authority of Act No. 16 of the Legislature of 1876.

3rd. That the case be referred to a master to take an account of said assessments.

4th. That said master give thirty days' notice to *all* holders of said warrants to prove their claims before him.

5th. That upon the filing and confirmation of said master's report, complainant and those who had proved their claims as aforesaid, were entitled to absolute judgments against said city for the full amount of their warrants and interest, if said accounting showed sufficient assessments due to pay them in full, and if not, then to *pro rata* judgments.

It established the validity of the notarial act and of the warrants issued thereunder, for both were alleged in the bill, offered in proof and passed upon by the Court, and only left open the establishment of the holdings of the other warrants, the amount of assessments from which they were to be paid, and hence the determination of whether they were to be paid in full, or *pro rata*.

Has the Circuit Court, with the assistance of the master and by its own decree, complied with the direction contained in the mandate of the Supreme Court of the United States? If it has, there can be no error in its decree, or in the decree of the Circuit Court of Appeals affirming the same.

There has been and can be no complaint of the reference to the master, nor of the directions therein contained, for they are in the precise language of said decree, with the solitary addition of the name of the master. There has been no objection, and there was no exception anywhere to the proof, or the holdings of said warrants; and in fact when, and as, the warrants were proved, offered and filed with said master by the various holders there was no objection whatever urged against any of them, nor was there any exception or objection to the amount of assessments proved and reported to be due by the city or individuals, nor that said assessments were not greatly more than sufficient to pay all the warrants proved, in full, nor that the decree of the Circuit Court is not based exclusively on the master's report as filed. The first objection that was made, was in the way of an exception filed with the master (R. p. 108; also p. 39 of the appendix to this brief) to his report as first drafted, and it was, that the advantages of the aforesaid decree extended only to warrants aggregating $153,750, which were those first on the amount issued, and which it was contended were issued in payment of the purchase of the dredgeboats, and hence were purchase warrants, and as to the balance of said warrants, which it was said were issued in settlement of a claim for damages and for work done should have been rejected, because not purchase warrants in any sense.

As before stated, these exceptions were overruled by the master (and we invite attention to his able supplemental report in so doing), and upon adhering to his report as originally drafted, the same exceptions—but on the claims of intervenors only and not on claim of complainant—with the correction heretofore noted (R. p. 143), were repeated and filed in the clerk's office,

and as before stated were overruled by the Circuit Court, the said report was confirmed and decree rendered for the amounts reported.

The above contention is in direct opposition to the very terms of the decree to which said exception refers, for it provides that the assessments therein mentioned are a—

> "trust fund * * * for the purpose of paying the *claims of complainant and other holders of the same class of warrants issued under the act of sale from Van Norden, transferee, to said city authority of Act No.* 16 *of the Legislature of the State of Louisiana, approved February* 24, 1876."

The correctness of this part of the decree was directly challenged by the 15th assignment of error filed in this honorable Court on March 14, 1899, the day after the case was argued and submitted, by permission (R. p. 74).

And the master was directed to give notice, not to the holders of $153,750 of said warrants to appear before him and establish their claims, but to—

> *" all holders of warrants issued as aforesaid."*

whom, said decree declared, were entitled to establish their warrants before said master without reference to formal interventions, and entitled to judgment in full in case the fund was sufficient upon proof of their claims.

There was, and is, no objection to the form of notice which the master issued to the other holders of like as complainant, nor is there any contention that the warrants presented to, and admitted by, the master were not like those of complainant, and issued under the same notarial act; nor is it contended that any of them had been paid; nor that the assessments named in said decree were not more than sufficient to pay them in full. The exceptions, and the contention based thereon, are not against the acts and doings of the master, made in pursuance of the directions in said decree contained, but against the decree itself, affirmed in all respects by this Court and by it ordered to be complied with.

It is true said decree is in favor of Warner alone (and as to

his claims there is no exception), but his suit is a creditor's bill, brought by complainant for himself and others holding like obligations, and the moment said others appeared and proved their claims, the decree in favor of Warner was binding and conclusive on the defendant as to each of them. We think this principle was decided in Richmond vs. Irons, 121 U. S. p. 27, where most of the authorities cited by defendant to establish the contrary, were examined, and where the Court, at p. 54, used the following language in holding the prescription there pleaded as to intervening complainants had no force as to said intervenors the moment they appeared and established their claims:

> "Each creditor becomes a party to the suit, it is true, only when he appears to prove his claim. His right to proceed depends upon the fact of his being the owner of a valid claim against the corporation; but if he proves such claim, then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered as a party complainant from the beginning by relation to the time of filing the bill. The beginning of the suit as between the creditor and the stockholder is the date of the filing of the bill, if during its progress and pendency he proves his right to be considered as a complainant. It follows, therefore, that the statute sought to be applied in the present case ceased to run as against the complainants from the date the bill was filed, in October, 1876, under which they subsequently established their right to come in as participants in the benefits of the decree."

And in Hammond vs. Hammond, 2 Bland, of (Md.), 362, the Court said:

> "The principle upon which an injunction rests in such cases in that, substantially, a bill by a creditor in behalf of himself and all others, or a suit by any one, in which all the creditors may be represented, and allowed to come in to obtain satisfaction, is considered as making all of them parties to it, and that the decree is in the nature of a judgment for them all."

See also Brooks vs. Gibbons, 4, page 374; and Thompson vs. Brown, 4 Johns, Ch. 619.

It is, therefore, not true that the benefits of said decree extend only to the first $153,750 of drainage warrants issued, but to the full amount issued under said notarial act.

And that the city had the most ample authority to enter into said notarial act and issue all the warrants therein provided for and delivered, we will show hereafter.

II.

As to the propriety of disregarding said decree of the Circuit Court of Appeals, affirmed by the Supreme Court, with a direction that it be complied with, and entertaining defenses for the first time urged in the Appellate Court on this last review.

It may be that a Court of Chancery, under certain circumstances, will not lend its aid to enforce a decree where there are elements of "injustice, mistake, surprise, apprehension, or want of consideration" discovered, but who beside the most learned counsel in this case will dare to say that this can be said of the decree herein, rendered by the United States Circuit Court of Appeals after full argument and due consideration, and again after full argument, and consideration from March 13, 1899, to January, 1900, affirmed in all respects by the Supreme Court of the United States and remanded to the lower Court with a direction that it be complied with? Who beside the learned counsel herein will say that a decree thus rendered, thus affirmed, and thus ordered to be complied with, has in it, or can have in it, an element of injustice, mistake, surprise, apprehension or want of consideration? It may be that a court of equity will sometimes refuse to lend its aid to the execution of a decree of a lower Court never reviewed on appeal, or a decree entered by consent and without consideration by the Court, but here it is the decree of the highest Court in the land, sitting in equity, that is sought to be assailed, and why?

Not because of any act of complainant or any of the intervenors, not because petitioner has not had a full and fair trial, from the lowest to the highest Court of review, not because of any

newly discovered evidence, not because of any alleged suppression of evidence, or of any alleged fraud committed on the part of complainant or intervenors, but because, and only after a decision has been rendered in the Circuit Court in pursuance of said decree and appealed to and decided in the Circuit Court of Appeals, the defendant fancies it might have made the defense of want of authority in law to issue warrants in settlement of the claim for damages and in compromise of drainage collections diverted, and the defense of want of appraisement of said claims.

The proof, and every part of it, on which this supposed defense is based, was not only not suppressed, but on the contrary was on the filing of the bill herein furnished by complainant, because it is contained in an exhibit filed with the bill and made part of it. (R. pp. 10 and 43.)

If this is a good defense, should it not have been made when the case was heard on demurrer? Should it not have been availed of in defendant's answer where it admits its execution, and in its argument, oral and printed? And especially should it not have been put forth when said claim for damages and misappropriation, as well as the value of the franchise, were discussed, orally and by brief argued before this Court (because the brief of defendant, from which we print extracts in the appendix hereto, shows these very points were discussed, while the opinion herein shows they were considered by the Court)?

If this defense is good now it was good then, and this being so shall the case be opened for a further and new defense because the defendant has forgotten something, or because it wants to try something which it did not think worth anything?

But this is not all. This defense of want of authority to issue said warrants in settlement of the claim for damages and that of collections diverted and the defense of want of appraisement of said claims, as well as the want of appraisement of the franchise, was not made in the answer—was not even made before the master after the case was sent to him, by exceptions filed with him or otherwise; was not made before the Circuit Court by any ex-

ceptions there filed to said master's report, has not been tried or passed upon by the Circuit Court, but is, for the first time, sought to be injected into this litigation after the case has been heard and decided by the Circuit Court, and only after an appeal was taken to the United States Circuit Court of Appeals. This will clearly appear by reference to defendant's answer, to the exceptions filed before the master, and to those filed in the Circuit Court, and comparing them with the assignment of error on which the appeal to said Circuit Court of Appeals is based. See R. p. 150, also appendix to this brief, p. 42, where said exceptions and assignment of error are printed in full. This cannot be done. Even the Circuit Court should disregard any matters, on a consideration of a master's report, not raised by exception filed with said master.

In Story vs. Livingstone, 13 Pet. 359, at page 386, the Court said:

> "Strictly, in chancery practice, though it is different in some of the States, no exceptions to a master's report can be made which were not taken before the master; the object being to save time and give him an opportunity to correct his errors or reconsider his opinion. Dick, 103. A party neglecting to bring in objections cannot afterwards except to the report (Harr. Ch. 474), unless the Court, on motion, see reason to be dissatisfied with the report, and refer it to the master to review his report, with liberty to the party to take objections to it."

In McMicken vs. Perin, 18 How., at page 510, the Court said:

> "In Story vs. Livingstone, 13 Peters, 539, the Court decided that no objections to a master's report can be made which were not taken before the master; the object being to save time and give an opportunity to correct his errors and reconsider his opinion. * * * This Court will not review a master's report upon objections taken here for the first time."

In Topliff vs. Topliff, 145 U. S. p. 156, the Court reviews the above authorities, and at page 172 said:

> "It is sufficient to say in reply to this that no such exception was taken in the Court below to the master's report,

the only exception being that, in view of the Stringfellow & Searles patent, the master should have reported only nominal damages. It was held in Story vs. Livingstone, 13 Peters, 359, 366, that proper practice requires that no exceptions to a master's report be made which were not taken before the master, the object being to save time and give him an opportunity to correct his errors or reconsider his opinion. A party neglecting to bring in objections cannot afterwards except to the report, unless the Court, upon motion, see reason to be dissatisfied with the report and refer it to the master to review, with liberty to the party to take objection to it. And in McMicken vs. Perin, 18 How. 507, it was held directly that this Court will not review a master's report upon objections taken here for the first time. In affirmance of this principle, Rule 21 (sub. 2) requires that, 'when the error alleged is to a ruling upon a report of a master, the specification shall state the exception to the report and the action of the Court upon it.' This presupposes that the particular exception relied upon was taken in the Court below, and was passed upon by the Court adversely to the appellant. Proper practice requires that objections to a master's report shall be taken in that Court, that any errors discovered therein may be rectified by the Court itself, or by reference to the master for a correction of his report, without putting parties to the delay and expense of an appeal to this Court. It would be manifestly unjust if this Court, after having affirmed the action of the Court below in every particular"—

(the very thing which it has done in this case)—

"should take up an error in a master's report which was not called to its attention, and reverse the case upon that ground, where, if exception had been duly taken, the error could have been at once corrected. There is nothing in this case to indicate that this point was ever made before the master, nor is it noticed in the eight exceptions taken to the report, which was set aside upon other grounds, or as, already observed, in the exception to his first report."

And questions not raised and passed upon in the lower Court cannot be assigned as error in the Supreme Court.

In Bell vs. Bruen, 1 How. p. 169, the Court, in passing upon a like matter, said:

> "The record shows this ground of defense was not brought to the consideration of the Circuit Court; we do not, therefore, consider ourselves at liberty to express an opinion upon the questions."

In Marine Bank vs. Fulton Bank, 2 Wall. 252, at page 258, the Court said:

> "The counsel for plaintiff in error raises the point, that the action was trespass on the case for wrongfully receiving the depreciated paper, and that the circular is a sufficient defense to such a count. This is undoubtedly true, both as to the nature of the action and as to the effect of the notice, and if it had been in any manner made a point in the Court below, we do not see how we could avoid reversing the judgment. But nothing of the kind was done. All the testimony was received without objection. No instruction was asked of the Court by either party as to the effect of the testimony in sustaining plaintiff's case, or as to the effect of the notice in making good defendant's receipt of depreciated paper. * * * It is too late now to object for the first time to the particular form of action."

In Klein vs. Russel, 19 Wall. p. 438, the Court, at page 463, said:

> "It is insisted, in this connection, that the reissue is void, because it was not for the same invention as the original patent. This point does not appear to have been taken in the Court below, and, therefore, cannot be made here."

In Badger vs. Ranlett, 106 U. S. p. 255, the Court, at page 259 and 260, said:

> "The plaintiff in error cannot raise the question as to the duty of one cent and one-fourth per pound, because it does not appear that he raised it on the trial."

In Coffey vs. U. S., 116 U. S. p. 436, the Court, at page 441, said:

> "In regard to the 1st, 3rd and 4th assignments, the questions presented by them were not formally raised in the Circuit Court, and are not presented by a bill of exceptions and cannot be considered here."

26198

Even where the jurisdiction of the Supreme Court is sought under the 5th section of the Act of March 3, 1891, it must appear that the constitutionality of a law of the United States was drawn in question and directly passed upon in the lower Court before the Supreme Court can entertain the case, and that this question cannot for the first time be raised in the latter Court by an assignment of error to the decision of the lower Court.

In Ansboro vs. U. S., 159 U. S. p. 695, at page 697, the Court said:

> "But we cannot find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on admission or exclusion of evidence, nor to instructions given or refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject in the assignment of errors, filed February 13, 1895.
>
> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly that our jurisdiction can be invoked for that reason. *Borgemeyer vs. Idler,* 159 U. S. 408; *Carey vs. Railway Company,* 150 U. S. 170; *In re Lennon,* 150 U. S. 395; *Northern Pacific Railroad Company vs. Amato,* 144 U. S. 465, 472; *Sayward vs. Denny,* 158 U. S. 180. An assignment of errors cannot be availed of to import questions into a case which the record does not show were raised in the Court below and rulings asked thereon, so as to give jurisdiction to this Court under the fifth section of the Act of March 3, 1891."

In Cornell vs. Green, 163 U. S. p. 75, the suit was commenced by a bill in equity, and at page 79 the Court said:

> "The Constitution of the United States is not mentioned in the bill of Cornell, or in the demurrer of the defendant, or in the opinion or decree of the Court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right. The first indication of anything like an intention on the part of the plaintiff to invoke the protection of the Constitution of the United States is in the suggestion, in the assignment of errors, 'that said finding deprived said complainant of his property without due process of law.'"
>
> "The case is governed in every respect by recent decisions construing the same clause of the Act of Congress."

The Court then concludes its opinion by quoting from the foregoing case of Ansborough vs. U. S., and again says:

> "An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the Court below and rulings asked thereon, so as to give jurisdiction to this Court under the fifth section of the Act of March 3, 1891."

III.

But on the supposition that we are all wrong in the foregoing, that nothing has been decided on the merits of this case, notwithstanding the long and earnest litigation herein during which it has passed three times through the Circuit Court, three times through the United States Circuit Court of Appeals, and been twice passed upon by the Supreme Court of the United States; and on the further supposition that after this earnest and protracted litigation it has been discovered that the decrees heretofore rendered herein ought now to be inquired into, and that exceptions never taken before the master, never filed to said master's report after it was filed in the clerk's office of the Circuit Court, and never heard or passed upon by said Court, and never raised until the case is heard in the Appellate Court, can be there

raised for the first time and decided, we will undertake the discussion of the merits of the case as raised by the various admissions and contentions of defendant, just as if the matters raised thereby had never been heard or passed upon by the Courts.

The contention now is as follows: That the benefits of the decree herein rendered does not extend beyond the first $153,750 of warrants issued, which it is contended were purchase warrants, and no farther, and that the balance of said warrants, whether issued to pay for purchase of the franchise, or in "settlement" of the claim for damages, or in "settlement" of drainage assessments collected and diverted from the drainage fund, were illegally issued and are void because not authorized by the statute of 1876, and because issued without appraisement beyond said $153,750. This alleged want of authority and want of appraisement is for the first time raised after the case was on appeal, and will be discussed hereafter.

The above is a clear admission (if admissions in the pleadings of this defendant are binding on her) of the liability of said city to the amount stated, and of the correctness of the decree herein for said amount, but on the theory on which it is contended that the liability as to be confined to the first $153,750 of warrants issued is untenable.

In the first place, counting from the first warrant issued under said notarial act, no such sum can be found. The first on the list are ten warrants for $10,000 each, making $100,000. These are followed on said list by 20 warrants of $5000 each, making $100,000, and next on said list follows 60 warrants of $2000 each, making $120,000, of which, two warrants of two thousand dollars each have been paid by the city. It will thus be seen that the sum of $153,750 cannot be figured out of the warrants issued —certainly not, unless by splitting some of them up, which neither the notarial act under which they were issued—whether an act of sale, or purchase, or settlement, or compromise, will permit.

Again. If the decree in favor of Warner for $6000, payable out of drainage assessments, based upon warrants by him pro-

duced, is of any value as determiningg anything in this case (and the brief presented by defendant's counsel on petition for *certiorari* admits it is, and the exception to the master's report filed in the clerk's office by its terms only relates to intervenors, and contained no prayer for any relief whatever), then, on the theory of the defense, that all warrants issued are to be considered as applied in their numerical order, it was definitely decided by the Circuit Court of Appeals and affirmed by the Supreme Court that the warrants issued in payment of the purchase of the franchise, or in "settlement" of the claim for damages, are legal and entitled to be paid, for Warner's warrants do not fall among the first $153,750 issued, but come after the first $272,000 issued, as appears by defendant's statement of warrants issued under said notarial act (R. p. 137 to 139), being Nos. 379, 380 and 381, and the defendant's liability on these warrants is the very first thing decided in the foregoing decree.

Again. The judgment at law of Wilder & Company, intervenors, rendered on May 24, 1898, (R. p. 155 to 158,) after the case had been remanded from the Circuit Court of Appeals, from which no subsequent review was asked or allowed, establishes the same thing, for as appears from the petition in the suit (R. p. 155), said judgment was based—

> "on two certain warrants, dated June 6, 1876, one for $2000 and one for $5000, issued by the City of New Orleans * * to Warner Van Norden * * and by him endorsed, which are on file herein and made part hereof, being part of a lot of $320,000, delivered for the purchase of certain property described in an act of sale passed before G. LeGradeur, Jr., Notary Public, dated June 7, 1876, filed herewith and made part hereof, all issued and delivered pursuant to an Act of the Legislature, approved March 24, 1876, being No. 16 of that year, and payable out of drainage tax assessments, created under and pursuant to the following Acts of the Legislature of Louisiana, to-wit: Act No. 165, approved March 18, 1858; No. 191, approved March 17, 1859; No. 57, approved March 1, 1861, and Act No. 30 of the year 1871."

See also said judgment, R. p. 158.

Surely there can be no doubt that the warrants on which this judgment is based were part of the $320,000 issued under said notarial act. It is true their numbers do not appear by said petition, but what said numbers were is conclusively shown, for the petition is only a part of the exhibit in the proof of said Wilder & Company filed before the master, as appears on page 112, where said warrants, the foregoing petition, as well as the answer and the judgment based thereon were offered in evidence, and from which it appears said $5000 warrant is No. 341, and said $2000 is No. 402.

On page 137 and following of said record is a "statement of purchase warrants, or warrants issued June 6, 1876, under act of sale of June 7, 1876, by * * Canal Company and W. Van Norden to the City of New Orleans before Gustave Legardeur, Notary Public," from which it appears that said warrant No. 341 falls far below said first $153,750 issued, and in fact when added to those going before it makes $195,000 of warrants issued.

Surely, it has again, on the very theory of the defendant, been conclusively decided that the warrants issued in "settlement of the claim for damages, or for the purchase of the franchise," are legal and valid by a final judgment based thereon in a suit against the defendant herein.

Nor is this all. On the same theory of the defendant, and in fact on the direct proof (for it appears that warrants Nos. 393 to 402, inclusive, aggregating $20,000 (R. p. 131) were "issued in compromise of judgment against the City of New Orleans for drainage taxes due on the New Orleans Park"), it has also been decided that said $20,000 of compromise warrants were legal, as evidenced by the same judgment in favor of Wilder & Company, for the second of the warrants on which they recovered, was the very last of the $20,000 issued under the bill of sale in satisfaction of the said drainage tax on said Park and wrongfully applied to general fund purposes.

The situation, then, as to the entire issue of the $320,000 under said notarial act, on the admissions of the defendant, and on the admitted decisions on warrants, is simply this. The liability of the city on $153,750 of what defendant calls strictly purchase warrants, is by it admitted. The liability of the city on the balance of the issue of the $300,000 issued under said notarial act for the purposes therein stated, whether to settle claims for damages or for the purchase of the franchise, on the contention of the defendant, is established by the solemn judgment in favor of Warner on warrants No. 379, 380 and 381, and the city's liability on like warrants is again established by the solemn judgment in favor of Wilder & Co. on said warrant No. 341, and the liability of said city is likewise established on said $20,000 of what are called compromise warrants by said solemn judgment of Wilder & Co. on said warrant No. 402. And here it is proper to remark, that defendant has again admitted its liability on said issue of $20,000 of warrants by paying two of them for $2000 each, to-wit: Nos. 400, 401 (R. p. 139).

And whether the purchase of the franchise was a matter of value to the city or not is of no concern in the present inquiry (and we will hereafter show it was), for the notarial act under which the purchase and settlement was made and all the warrants thereunder issued and delivered are executed contracts, which have never been set aside for error, fraud, or mistake in their execution. But in addition to this, the contention that it had no value, but on the contrary imposed the burden of doing drainage work, for the payment of which no means were provided, has several answers.

In the first place, it has always been contended there was no obligation imposed on the city to continue the work of drainage, and this as late as the answer filed in this case. (R. p. 26.)

And the city has always contended the drainage contract was a most onerous contract, that the price paid was entirely too high, and that it ought to be terminated. She contends this in part at the very outset in Ordinance No. 814 (No. 172, October term, 1899, R. p. 244), when undertaking the performance of the

duties imposed on her by Act No. 30 of 1871, she complained of being denied the right to fix the price to be paid for the work to be done under said contract.

And to prove that it was onerous and the prices exorbitant, the defendant called several witnesses. Brown (R. No. 172, October term, 1899, on page 446) testified the price of 50 cents per cubic yard for digging canals and 50 cents per cubic yard for building levees was twice as much as it ought to have been, and Major Harrod testified to the same thing at page 466 of same record, while, as we will show hereafter, it was of great value to the Canal and Van Norden. And as to the settlement of the claim for damages, the proof shows this claim had long prior to the execution of said notarial act been asserted by the Canal Company and Van Norden, for the ordinance of the Council No. 3479 (R. p. 42) calls upon said Hardee to state what the records of the office of the city surveyor show on this subject; certainly for the purpose of showing what would be a reasonable sum to be paid in settlement thereof. This, of course, was the city's side of the claim, but not the side of Van Norden and the Canal Company, who did not herein offer, and were not called upon to offer, proof on this subject, and simply because the matter had crystallized into a settlement, which has never been attacked or set aside for error, fraud, or mistake. This claim, said notarial act in direct terms declared was settled by the issue and delivery of said $300,000, and in addition thereto all claims that they might ever hereafter have.

Next, as to the settlement of the claim for drainage money collected by the city and misapplied. The fact of this collection and misapplication is too clear to admit of discussion. It is not denied by defendant. The evidence (settlement in the suit of the Commissioners of the New Orleans Park (R. No. 172, October term, 1899, pp. 230 to 242, and especially page 238, in connection with page 317) shows it. The notarial act admits it, for it provides for the issue of warrants, and the city actually did issue them in satisfaction thereof.

The only contention now is that there was no authority given by the Legislature to make such settlement, but this matter will be discussed later.

And here it is to be observed that there can be no doubt of the right of the holders of drainage warrants to have drainage taxes collected applied to the payment of these warrants, nor can there be any doubt of their right of action for a violation of this right. This right and right of action would flow from the very relation existing between the parties, but in this case these rights are doubly clear, for the duty of the city in the premises was specially provided for in the ninth section of Act 30 of 1871, as follows:

> "Be it further enacted, etc., * * That all money or moneys received by said Board of Administrators from said commissioners of the drainage districts, either from the sale of property received from said commissioners, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this this section of this Act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and be held as a fund to be applied *only* to the drainage of New Orleans and Carrollton, in accordance with the provisions of this Act."

IV.

And the authority of the city to enter into said notarial act and issue and deliver all the drainage warrants therein mentioned, whether for the purchase of the dredgeboats, implements and machinery, or the franchise, or in settlement of the claims for damages or moneys collected and diverted, was most ample.

The Act of the Legislature of February 24, 1876, pursuant to which said notarial act was executed and all of said warrants issued and delivered, authorized the city to do two things, to-wit:

> "*To transact and contract* * * for the *purchase and settlement* of all or any rights, franchises and privileges created, authorized, or arising in favor of said company or said transferee under and by virtue of Act No. 30 of Acts of

1871; *also,* for the purchase and transfer to the City of New Orleans of all tools, implements, machines, boats and apparatus used for or pertaining to drainage work authorized to be done by said Act No. 30."

As to the former, the city was authorized "to transact and contract" * * "for the purchase and settlement" thereof, while as to the latter it was authorized "to transact and contract" * * "for the purchase and transfer" thereof.

"Purchase" of what rights, franchises and privileges arising in favor of said company or its assignee? Clearly the franchise and privilege to do drainage work on the terms stipulated in said Act 30 of 1871, as well as to purchase the physical property of the company in the shape of tools, implements, &c. And "to transact and contract" for the "settlement" of what? Clearly for the violation of all and any rights by said Act granted, among which was the right granted by the sixth section of said Act 30 of 1871, to claim damages, as follows:

> "That the Board of Administrators shall be required, and it is hereby made their duty, immediately after the passage of this Act, to locate the lines of the canals and protection levees specified in the various sections of this Act in time to prevent delay in the prosecution of the work of said company; * * and should the City Council fail to locate the lines of said canals and protection levees above specified, the City of New Orleans is hereby made liable for the damages resulting from such delay."

This claim for damages, the proof (Hardee's inventory and report (R. pp. 48 to 50) and Ordinance No. 3479 (R. p. 42) shows had long prior to the passage of said Act No. 16 of 1876, been asserted by said company and its transferee; and further shows, beyond all doubt, that said Act was passed to provide for a settlement thereof.

And not only "to transact and contract" for the "settlement" of said claim for damages, but also "to transact and contract" for the "settlement" of the violation of the right which said company and its transferee had, to have all drainage tax collec-

tions deposited to their credit and made available for the purposes of drainage, under the ninth section of said Act 30 of 1871, the latter part of which, as before stated, provided—

> "that all money or moneys received by the said Board of Administrators from said commissioners of the drainage districts, either from the sale of property received from said commissioners, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this Act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with provisions of this Act."

And as before stated, the proofs show this provision was violated (R. p. 41) and in "settlement" of this violation the proofs further show $20,000 of warrants in addition to the $300,000, were issued under said notarial act, in compromise of a judgment for drainage taxes on the New Orleans Park, for $24,000 (R. p. 136), if not for $26,725.90. See suit of Commissioners of the New Orleans Park vs. City of New Orleans (R. No. 172, October term of 1899, pp. 230 to 244), and depositions of Butler, p. 317, in connection with statement on p. 238. Also, see depositions of Fount, p. 315; Rabouin, p. 214, same record; all of which show that in the settlement of a judgment against the City of New Orleans, in the above suit, she was allowed to retain said last named sum, which she never deposited as required by the above Act, but retained the same as part of the general fund of said city.

And here it should be observed, that the words "to transact" as used in the above statute of 1876, under which said notarial act was made and said warrants were issued, under the jurisprudence of Louisiana, has a special significance, and means "to compromise," and read in this light means the City of New Orleans was authorized "to compromise and contract for the purchase and settlement of all and any of the rights, &c., of the Canal Company and its transferee, but of this more will be said hereafter, under the discussion of the matter of appraisement and

26203

whether the same was a condition precedent to the right to purchase, &c.

We think, therefore, that it is beyond dispute that the settlement of this claim for damages, and of this claim for drainage taxes misapplied, was authorized by said Act of 1876, and that said claims have been fully, fairly, conclusively, legally and in unmistakable terms settled by said notarial act, entered into under the authority of said legislative Act of 1876.

V.

As to the appraisement of the matters purchased and settled for, and as to whether such an appraisement was a condition precedent, or merely for the advice and assistance of the Council in making a compromise and purchase with the Canal Company and Van Norden, &c.

In the first place, it is to be observed there is no proof that a full and minute appraisement was not had of everything purchased and settled for, before the notarial act was signed.

It is true this record does not show any report or appraisement beyond that of Hardee of May 1, 1876, which fixed the value of the dredgeboats, machinery, &c., at $153,750, and reported the facts as to damages as they appeared on the records of the city surveyor's office, giving the number of cubic yards of work claimed by the Canal Company and Van Norden, they were prevented, by the city from performing and the number of cubic yards which he thought they were prevented from performing by said city, the price of which was fixed by the statute of 1871, which will be noticed hereafter.

But there is no proof that this was the only report or appraisement made, if any further appraisement was necessary, and if such further appraisement was necessary the presumptions are all in favor of the same having been made, and in any event such purchase and settlement must stand unless there is proof to the contrary, which the defendant has not offered or attempted to offer.

There certainly was ample time for such additional appraisement to have been made (if at all necessary to be made), before

the notarial act was entered into, because one month and six days intervened before the said act was signed—the report of Hardee in evidence being dated May, 1876, and the notarial act June 7, 1876.

But an appraisement of the matters and things authorized to be purchased and settled for, and actually purchased and settled was not a condition precedent to said purchase, but the provision in relation thereto was merely advisory, and not imperative, and the matters purchased and settled for were substantially appraised before said notarial act was executed.

Whatever was requisite and necessary to be done in this respect is to be determined by reference to the statute under which the authority to purchase and settle was granted.

As before stated, the statute authorized the city—

> "to transact and contract * * for the purchase and settlement of all or any rights, franchises, and privileges created, authorizing or arising * * under and by virtue of Act 30 of 1871; also, for the purchase and transfer to the City of New Orleans of all the tools, implements, machines, boats and apparatus belonging to said company or its transferee, and by it or him used for or pertaining to drainage work authorized to be done by said Act No. 30."

And the next section of said Act further provided:

> "That should it be deemed advisable by said Council to make said purchase and settlement, it shall be the duty of said Council of the City of New Orleans to provide by ordinance for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance."

These provisions are purely directory and not imperative, and especially does this appear when we take the whole statute together and consider the object thereof, and the character of the things to be purchased and settled for.

And in construing said statute we are to remember it is one of the Legislature of the State of Louisiana, and that its meaning is to be sought in the jurisprudence of that State. The very first

thing granted is "to transact and contract," and this in Louisiana has a special and well-defined meaning, quite different from the ordinary meaning of the words "to transact," as will appear from Article No. 3071 of the Civil Code of Louisiana, which declares:

> "A transaction or compromise, is an agreement between two or more persons who, for the purpose of preventing or putting an end to a law suit, adjust their differences by mutual consent."

The full measure of the authority granted was, that the city was authorized, without any limitation or condition, to "compromise" and contract for and in reference to the property rights and claims mentioned, to purchase what was susceptible of sale, transfer and delivery, and to compromise and settle for what was inchoate, intangible and incapable of delivery.

This was the view taken by the Council of the City of New Orleans, for in its ordinance appointing its own city surveyor its appraiser, it instructed him:—

> "to make a thorough examination of the condition and value of all the dredgeboats, machinery, tools and appurtenances belonging to the * * Canal Company or its transferee, and used for the excavating of canals or building protection levees, making a report to the committee of the whole, together with a statement of all information in the possession of his office, concerning damages claimed by said * * Canal Company, or the transferee thereof".

In short, he was to report the value and condition of the tangible property and all information in his office as to the claims for damages. And this ordinance and the powers and duties therein conferred were strictly within the statute, for by its terms, the duties and powers of the appraiser therein provided for were not coextensive with the general duties and powers of appraisers, but were such and only such as the Council might give them, for said statute in the most unequivocal terms provided:—

> "that the duties and powers of said appraisers shall be specifically assigned in said ordinance."

In other words they were to do just what the City Council requested them to do, and no more or less.

And when we consider the object of the statute, the alleged imperative necessity for an appraisement still further disappears. This was to get rid of the Canal Company and its transferee and the contract which the Legislature of the State had made with the former, and which had become the property of the latter. The justness and legality of this contract, from the very outset the city disputed, and notified said company that it expressly reserved the right to contest at law or otherwise the constitutionality thereof (R. No. 172, Oct. Term, 1899, pp. 244 to 247), while it ever contended the price paid for the work done was double what it should have been. (See same R., pp. 446 and 466).

To prevent this law suit as to the constitutionality of said drainage contract or franchise, to end the exorbitant price paid for the work done and to enable the city to assume the entire control of all matters of drainage (see preamble and section four of Act 16 of 1876), the city was authorized to compromise,—"to transact" with Van Norden and the Canal Company for the acquisition of their property, rights, contracts, franchises and claims of whatever nature and kind. This desired result by compromise, by giving and taking, by conceding on one side and the other, certainly could not be accomplished if one party to the desired compromise had no authority as to price except such as might be fixed absolutely by an appraisement.

And the character of the matters to be settled for also precludes the idea of an appraisement being a prerequisite condition, for who and what, but the verdict of a jury could fix the value of a claim for damages, or the value of the claim for moneys collected and misapplied, and especially when the wrongdoer was without credit, and when its acknowledged obligations were selling in the market for 26 1-2 cents on the dollar. (R. No. 172, Oct. Term of 1899, p. 395.)

We therefore think the appraisement was not a matter of necessity, but a means of assistance to enable the city intelligently to

26205

discuss the whole matter with the Canal Company and Van Norden, so as to accomplish the object to be attained, to get rid of said company and its transferee and their contract and their claims against her. There is nothing in the statute requiring that the said sum to be paid should only be the amount of the appraisement and not otherwise. In the absence of such requirement, the law applicable to this state of affairs is laid down thus in French vs. Edwards, 13 Wall. 506:—

> "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations prescribed to secure order, system and dispatch in proceedings, and by the disregard of which, the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that assigned."

See also *Enderlich on the Interpretation of Statutes,* Sec. 436, 437 and 433; also 21 Mass., p. 67.

Here the rights of no one was to be affected by said appraisement. The city certainly was not to be affected or concluded thereby, for she might reject any estimate said appraisers might make and refuse to "transact and contract" at all.

Surely in view of the foregoing it cannot be said that the action of the City Council in prescribing the specific duties and powers of its appraiser, just as she did on ordinance No. 3,479 (R. p. 42) was erroneous, that what said appraiser did in pursuance of the directions given him was illegal, nor that the notarial act of June 7th, 1876, and the warrants issued thereunder were not strictly valid and binding on the defendant.

And after all did not the city have a most substantial appraisement of this very claim for damages before she entered into said notarial act with Van Norden and the Canal Company pursuant to which all the warrants were issued? In the very same document in which the city's appraiser reports the value of the dredge-

boats, etc., at $153,750, he reviews said claim for damages (R. pp. 48 to 50), based on 363,000 yards of excavation, which through the fault of the city, the Canal Company and its transferee were prevented from performing, and after rejecting claims respectively on 80,000, 24,000 and 68,000 yards of excavation, reduced the remaining claim based on 190,000 yards of excavation to 149,445 yards of excavation, and at p. 49 said:—

> "These boats (Nos. 1, 4 and Clam Shell) finished the interior work they were engaged upon last November and were ready to proceed with the Lake shore revetment levee, but were prevented from so doing by the refusal of the city authorities to allow the city surveyor to furnish the necessary lines and levels."

The very things for which, as we have already seen under the 6th section of Act 30 of 1871, the defendant was to be responsible in damages.

Said appraiser on the same page further reported:—

> "The only boats therefore for which an assessment for damages can be entertained are No. 1, No. 2 and the Clam Shell, and I have deemed that the most equitable way to arrive at a conclusion is to make an abstract from the records of what these several boats earned in a certain period immediately anterior of being stopped, and accept this as a fair estimate of what they would have earned and been entitled to in cubic yards for the whole period of their delay.

	Cu. Yds.
Boat No. 1, 5 1-2 months at 12,720 yds per month	69,960
Boat No. 4, 5 1-2 months at 12,350 yds per month	67,925
Boat Clam Shell, 4 months at 2890 yds per month	11,360
Making a total of	149,455

Under the second section of said Act No. 30 of 1871 said Canal Company was:—

> "authorized and empowered to dig a canal, and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city of New Orleans, and near the shore of Lake Pontchartrain; the exact location of said canal and levee and of all canals dug and levees to be built by said company to be designated and fixed by the Board of Administrators," etc.

This is the identical levee referred to above by the city surveyor as "the Lake Shore revetment levee" where the city authorities had refused to furnish the necessary lines and levels for the construction thereof.

The compensation to be paid for the above 149,445 yards of excavation and for the protection levee to be formed with the earth excavated, as authorized by said second section, is fixed by the eighth section of the same Act at:

> "At the rate of fifty (50) cents per cubic yard of excavation, and fifty (50) cents per cubic yard for protection levee."

In other words the amount coming to the Canal Company and its transferee on the above basis was $149,445, which added to the above $153,750, makes $3,195 more than the $300,000 mentioned in said notarial act.

But this does not include the value of the exclusive contract or franchise for doing the balance of the work thereunder, which has been established by the city herself, for she has shown what the work remaining to be done could have been done for and hence the profits that would result therefrom, as follows:—

Major Harrod, at page 461 of Record No. 172, October Term, 1899, used under stipulation of counsel (see page 167 of the present Record), after stating his profession as civil engineer and his connection with the city of New Orleans as its chief engineer and that he was familiar with the work constructed and to be constructed by the Canal Company and Van Norden under said Act No. 30 of 1871, was asked what it would have cost to complete the protection levees and adjacent canals contemplated by said Act, gave the various items, which aggregate, according to the rate of compensation fixed in said Act No. 30 of 1871, $2,232,800.

This witness says these figures were exceedingly high, and on cross-examination at pages 468 and 469 (same record) states the work could have been done at one-half of this sum. And at page 446 and 467 of the same record, this witness is sustained by another city witness, H. C. Brown, assistant city engineer, as to the

price of the work allowed by said Act of the Legislature, and that it was twice as high as it should have been—that a fair price would have been 25 cents per cubic yard instead of 50 cents per cubic yard.

From the foregoing it appears that the value of the exclusive contract or privilege for the completion of the unfinished part of the work was to Van Norden and the Canal Company, on the evidence of the city herself, $1,116,400.

Surely this sum added to the amount reported by Hardee to the committee of the whole as the value of the boats, machinery, etc., to the amount of excavations which the city prevented the Canal Company and Van Norden from performing, shows that the $300,000 paid in drainage warrants for the boats, machinery, contract and damages—estimating the profits on the above basis—was not 25 *per cent.* of the value of the matters and things purchased and settled for, and that there can be no doubt that said purchase and settlement was most reasonable and advantageous to the defendant.

VI.

We think it is therefore very clear that in all things the master has complied with the instructions contained in the decree of said Circuit Court of Appeals, affirmed in all respects by the Supreme Court, and by the latter remitted to the Circuit Court to be carried into effect, and that in affirming said master's report and rendering judgment in favor of complainant and the holders of other warrants issued under the same notarial act, the Circuit Court has done only just what it was directed to do and that there is no possible error in its decree, nor in the decree of the Circuit Court of Appeals affirming the decree of the said Circuit Court, and that there never has been the slightest excuse for the present proceedings and the consequent delay and expense, and this being the case we think it is high time this trifling, dishonest defendant should be taught a useful lesson in this most frivolous appeal, and hence we ask that Rule 23, Div. 5, of this Honorable Court be

price of the work allowed by said Act of the Legislature, and that it was twice as high as it should have been—that a fair price would have been 25 cents per cubic yard instead of 50 cents per cubic yard.

From the foregoing it appears that the value of the exclusive contract or privilege for the completion of the unfinished part of the work was to Van Norden and the Canal Company, on the evidence of the city herself, $1,116,400.

Surely this sum added to the amount reported by Hardee to the committee of the whole as the value of the boats, machinery, etc., to the amount of excavations which the city prevented the Canal Company and Van Norden from performing, shows that the $300,000 paid in drainage warrants for the boats, machinery, contract and damages—estimating the profits on the above basis—was not 25 *per cent.* of the value of the matters and things purchased and settled for, and that there can be no doubt that said purchase and settlement was most reasonable and advantageous to the defendant.

VI.

The very fact that defendant has not in his answer, nor in his oral or printed arguments, nor in the proceedings before the master, nor in his exceptions to the master's report filed in the clerk's office of the Circuit Court, nor in his argument before said Circuit Court, and never until the case was appealed, made the defense of the want of appraisement beyond $153,750, and want of authority to settle the claim for damages and drainage moneys misapplied, is proof positive that it believed and knew that said notarial act of June 7, 1876, was not only an act of purchase of the tangible property therein described, but also "a transaction," a compromise and settlement of the claims for damages and moneys misappropriated, and that no appraisement of the latter was a condition precedent to the settlement thereof, and that the present late contentions are but like the efforts of a drowning person catching at straws.

enforced and defendant condemned to pay in addition to costs, ten per cent. damages, for we believe this litigation was completely finished when the decree was entered affirming the masters and rendering judgment in favor of the complainant and intervenors on like obligations, which it is not contended have ever been paid in whole or in part, was rendered.

We are aware that the right of appeal and review is a most sacred right and rarely ever ought to be discouraged, but in this litigation, where the case has been litigated until it is more than threadbare, where the defendant has been heard again and again, and when now, without any new pleadings or proofs, his only prayer is that the Court will refuse to recognize what it has so often and after the most thorough argument and consideration decided, who will say that this review has the slightest pretense of merit, and that the only possible motive therefor, was not to harrass and delay complainant and intervenors?

It is true the case is not technically before this Court on appeal or writ of error, but under the statute pursuant to which the right to review by *certiorari* is granted, the case after its removal under said writ is to be treated in this Honorable Court just the same as if it had come here by appeal or writ of error.

In Hubbard vs. Todd, 171 U. S., at page 494, the Court said:

> "It is provided in the Judiciary Act of March 3, 1891, Sec. 6, 26 Stat. 826, 828, that any case in which the judgments or decrees of the Circuit Court of Appeals are made final, may be required by *certiorari* or otherwise to be certified to this court, for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

It is but an appeal granted by the Supreme Court, instead of the lower court.

It is also true that none of the parties before the Court besides Warner were parties to the litigation at the time said decree of said Circuit Court affirmed as aforesaid, was made, but as to Warner, and as to Wilder & Company there are absolute decrees in their favor establishing the amount of the debts due them and

the source from which they are to be paid—that in favor of Wilder & Co. as early as May, 1898 (R. p. 81). Their claims are *res adjudicata;* and as to these, the appeal to the Circuit Court of Appeals, and the application to this Court not being based on the only possible open fact, to-wit, whether the assessments from which said judgments were payable was sufficient to pay all warrant holders in full—which finding by the master is not put in issue by any objection or exception made before said master, nor before the Circuit Court, nor in any assignment of error here made—what, we repeat, can be the motive for this appeal but to harrass, annoy and delay complainant and intervenors in the realization of the moneys so often decided to be due by this defendant. Clearly damages ought to be awarded them as compensation for the expense and annoyance on this most unfounded review.

And like damages should be allowed the other parties in addition to Warner and Wilder & Company, because, as we have seen under Richmond vs. Irons, 121 U. S., page 54, and Hammond vs. Hammond, 2 Bland (Md.), p. 362 and cases cited, above referred to, when intervenors, holding like obligations appeared and proved their claims, they from that moment became complainants with the same rights and to the same effect as if their names had been originally incorporated in the bill of complaint.

Surely the decree appealed from should be affirmed with costs and ten per cent. damages.

Respectfully submitted,

RICHARD DEGRAY,

Solicitor for Complainant and Intervening Complainants and Respondents.

2620

APPENDIX TO BRIEF.

EXCEPTIONS FILED BEFORE THE MASTER (R. p. 108), AND REFERRED TO IN THE FOREGOING BRIEF.

"*First*—That there is error in charging the defendant with liability for the whole of the uncollected assessments against private property owned by private persons, because the evidence shows that all such taxes as could be or were susceptible of collection have been collected and paid over to the parties and persons for whom they were assessed.

"*Second*—The advantages of the decree herein, under which this reference is made, extend to such warrants as were used in payment of the property purchased by the act before G. Legardeur, notary public, of date June 7th, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750 and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the Circuit Court of Appeals and of the Supreme Court herein; that such balance of warrants were issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company, and Warner Van Norden, against the city of New Orleans; that of said warrants the sum of $20,000 were issued, as will appear by the express terms of the said act, in payment of work which had been done by the Van Norden, that is, digging canals and building levees, which, at the time of the passage of the said act, had not been surveyed or measured by the city surveyor, and hence, that as to these warrants there could be no recovery or allowance; that in any event, the decree in the suit of J. W. Peake vs. City of New Orleans, No. 11,614 of the United States Circuit Court for the Eastern District of Louisiana, is *res judicata* in favor of this defendant.

"That although there is no mark or sign upon any of said warrants, which were issued in payment of the price of the property purchased, and which were given in settlement of the claim for damages, and which were executed and delivered in payment for drainage work which had been done, the said warrants can be so identified and distinguished, at

least so as to ascertain what amounts were issued in payments of the price of property, and which were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution, first for the payment of the price of the property purchased, next to the settlement of the claim for damages, and lastly to the payment for work mentioned in said notarial act; that all of said warrants bear date June 6th, 1876, the first one bearing the number 313, and ran up to and inclusive of number 402, as is shown by the statement of the said warrants contained in the record, as well as the warrants themselves, offered in evidence.

"That from an examination of said warrants, and a comparison of their numbers, it will be seen, that the issuance of warrant No. 332 there had been reached an issue of $150,000, adding to which, warrant No. 333, for $5,000, would make a total issue of $155,000, of a difference of $1,250 in excess of the amount intended and authorized to be issued for payment of the price of said property.

"Payment of all warrants subsequent to warrant No. 333 should be refused."

EXCEPTIONS TO MASTER'S REPORT FILED IN CLERK'S OFFICE, CORRECTED BY AGREEMENT, AND REFERRED TO IN THE FOREGOING BRIEF (R. p. 143).

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER

vs.

THE CITY OF NEW ORLEANS.

No. 12,350.

"Exceptions taken by defendant to the report herein made by the Hon. A. G. Brice, Special Master herein, on the claims of intervenors, save and excepting that of James Jackson:

"*First*—That there is error in charging defendant with liability for the whole of the uncollected assessments against private property, or property owned by private persons, because the evidence before the master shows that all such

taxes as could be or were susceptible of collection have been collected and paid to the parties and purposes for which they were assessed.

"*Second*—That the advantages and the decree herein, under which this reference in made extend only to such warrants as were issued in payment of property purchased by the act before G. Legardeur, notary public, of date June 7, 1876, which property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounting to $153,750 and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the Circuit Court of Appeals and of the Supreme Court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden, against the City of New Orleans; that of said warrants, beside those issued in settlement of said claim for damages, the sum of $20,000 were issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the City of New Orleans prior to June 6, 1876, and applied to general fund purposes, and hence as to these warrants, in any event, there could be no recovery or allowance made; that in any event, the decree in the suit of J. W. Peake vs. City of New Orleans, No. 11,614 of the United States Circuit Court for the Eastern District of Louisiana, as *res adjudicata* in favor of this defendant.

"That although there is no mark or sign upon any of said warrants, which were issued in payment of the price of the property purchased, which were given in settlement of the claim for damages, and which were executed and delivered in payment of drainage work which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payment of the price of said property, and which were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution, first for the payment of the price of the property purchased, next to the settlement of the claim for

damages, and lastly for the payment for work mentioned in said notarial act; that all of said warrants bear date June 6, 1876, the first one bearing 313 and ran up to and inclusive of the number 402, as is shown by the statement of the said warrants contained in the record, as well as the warrants themselves, offered in evidence.

"That from an examination of the said warrants, and a comparison of their numbers, it will be seen, that with the issuance of warrant No. 332 there had been an issue of $150,000, adding to which warrant 333 for $5,000, would make a total issue of $155,000, or a difference of $1,250 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

(Signed) "BRANCH K. MILLER,
"Solicitor for Defendant."

ASSIGNMENT OF ERROR REFERRED TO IN THE FOREGOING BRIEF, FILED ON TAKING APPEAL TO UNITED STATES CIRCUIT COURT OF APPEALS.

"*First*—That the Court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, Special Master, filed in this Court on the ——— day of March, 1900; that the Court should have maintained such exceptions to the report, and have entered a decree in favor of respondent.

"*Second*—That from the evidence before the Court, accompanying the said report, it conclusively appeared that the dredgeboats, derricks, etc., and the other tangible property, or property having a physical existence, purchased by the City of New Orleans from Warner Van Norden and the Mexican Gulf Ship Canal Company, by authentic act before G. Legardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750, *under the appraisement made pursuant to the Act of the General Assembly of Louisiana No.* 16 *of* 1876, and that to this extent only, and no farther or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the City of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment of

the purchase price of property, and hence, not entitled to the benefits of the decree in this case.

"*Third*—That as to the $20,000 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the City of New Orleans to other drainage purposes, there was no warrant or authority in law, or otherwise, for their issuance; that they were in no sense purchase warrants or warrants issued in payment of the price of any thing, in the sense of the findings of this Court, or of the Supreme Court of the United States, in this cause; that the Circuit Court erred in admitting them to any participation in the fund ascertained by the master to be due by the City of New Orleans, to their payment out of the same.

"*Fourth*—That as to the remainder of the said $320,000 issued as shown by the said act of sale from Van Norden and said Company to the City of New Orleans, that is, the residue, after deducting the said $153,750, the value of the dredgeboats, etc., and $20,000, in satisfaction of drainage taxes claimed to have been diverted, to-wit: $146,250, they were issued without any warrant or authority of law, the said Act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the City of New Orleans and were a mere gratuity; that as far as the said residue of said warrants may have been, or pretended to have been issued in settlement of any claim for damages due by respondent to Warner Van Norden or the said company, it was without warrant or authority of law, the said Act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; *and that even were it otherwise, there was no appraisement of said damages, which in any event would be a condition precedent under said Act of* 1876, *for any settlement or adjustment thereof;* that so far as said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of the said franchises by respondent was not an acquisition of property, or any thing of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees and to charge therefor at the rate

of fifty cents per square yard for each class of work, while the assumption of this work by the City of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charges therefor against any person; that in any event, no contract could have been made for the purchase of said franchise, *except at a price fixed by an appraisement, under the Act of* 1876, *prior to its purchase, and no such appraisement was made.* That the Court should have refused the allowance of said residue of warrants against the fund ascertained to be due by respondent and should have rejected any claim against the same evidenced by warrants in excess of the said $153,750, while as a matter of fact the whole amount of the said $320,000 of warrants issued by the city were decreed to be payable out of the said funds, save $4,000 thereof, which has been paid, in which finding the Court was in error.

"*Fifth*—That warrants to the extent only of $153,750 should have been admitted as due by the city out of said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the Act of 1876, and afterwards to have done what there was no right to do.

"*Sixth*—That the Court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a unit, in which there was error; that the Court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750, ascertained as aforesaid.

"*Seventh*—That the Court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decree in this cause, made and entered by this Court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issue raised by the latter had never been considered by this Court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either Court; that the Circuit Court erred in so holding, and should have held the reverse.

26211

"Wherefore respondent prays, that the said decree be reversed, and that the said Court may be directed to enter a decree in accordance with the prayer of the defendant on the exceptions to the report of said master."

EXTRACT FROM BRIEF OF DEFENDANT (PP. 3 AND 4), ON THE QUESTION OF THE SALE OF THE FRANCHISES AND THE SETTLEMENT OF THE CLAIMS FOR DAMAGES, AND FOR THE MISAPPLICATION OF DRAINAGE MONEYS COLLECTED, AS FILED AND USED IN THE ARGUMENT OF DEFENDANT, IN WARNER VS. NEW ORLEANS, NO. 172, OCTOBER TERM OF 1899, 175 U. S. 120; ALSO EXTRACT FROM OPINION OF SUPREME COURT ON SAID MATTER.

The defendant, after contending that the price paid by it ($300,000) was too high, because Van Norden, more than three years prior to said sale had bought the same property for $50,000, said in said brief:—

"It may be replied that by the city's act of purchase she acquired not only the derdgeboats and like property, but also the rights, privileges, and franchises of the Canal Company, conferred by Act No. 30 of 1871.

"But a reference to the statute will show, that the franchises and privileges of the Canal Company were to dig canals and build levees, for the prices allowed by the Act; the purchase of these franchises by the city, was less an acquisition, than it was the assumption of an obligation to do drainage work, and collect the cost thereof from the property liable to assessment under the statute; all for the benefit of Van Norden. It appears by the appraisement (R. p. 95), that the value of the derdgeboats and other tangible property was fixed by the city's appraiser, at one hundred and fifty-three thousand seven hundred and fifty dollars ($153,750); the appraisement contained a reference to the damages claimed by the Canal Company for delays, upon which, however, no value was placed. It would be interesting to know the basis of the difference between $153,750, the value of the dredgeboats and other property, and the $300,000 which was eventually paid by the city as the price. The claim for damages in no respect entered into this sum, as it is not men-

tioned at all in the act of sale" (not true, see R. p. 100, where it is stipulated said $300,000 also in full settlement of all claims the Canal Company and Van Norden then had, or ever had, or might thereafter have) "which is a conveyance only, of the franchises of the company and of the tangible property mentioned. The first section of the Act of 1876 authorized the city to make the purchase and settlement of the Canal Company of any and all rights, franchises or privileges, arising out of the Act of 1871, also the purchase of all tools, implements, machines, boats and apparatus, belonging to the company or its transferee, used for work authorized by the Act of 1871; the second section of the Act directs an appraisement to be made of the rights and things to be purchased and settled for, if the Council should deem it advisable to make the purchase. It is seen that the appraisement of the property reached an infinitessimal amount in excess of about one-half of the amount paid, and that the franchises of the company, which, it may be remarked, had already been sold by the company to Van Norden on November 22, 1872, were not appraised at all.

"A possible explanation of this may be found in the assumption that they were considered of no value, or susceptable of appraisement at all; the mention in the act of purchase of the payment of twenty thousand dollars ($20,000), in settlement of an amount claimed to have been diverted by the city, furnishes no aid to complainant in this view of his case, as this was in addition to the $300,000 paid for the property and franchises."

And a few extracts from the opinion of the Court in said case will show how the above were considered by the Court, which at page 175 said:—

"Acting under the authority of this Act of February 24, 1876, the city accepted the option, appointed an appraiser of the property of the Ship Canal Company, and authorized the Mayor to purchase of said company, or its transferee, *all its property, and to stipulate for a full settlement of all its claims for damages.* Thereupon the Mayor entered into a contract with the Canal Company and with Van Norden, its transferee, *for the purchase of their property and the relinquishment of all their claims for damages, for the sum of* $300,000, *payable in drainage warrants.*"

And in further speaking on this matter the Court, at pages 144 and 145, said:—

"These warrants were to be issued not only in payment of the drainage plant but in settlement of Van Norden's claims against the city for damages connected with the failure of the city to carry out its contract with the Canal Company and Van Norden, which, in view of the fact that the drainage plant had been purchased by him for $50,000, may be assumed to have been the greater part of the consideration.

* * * * * *

"It is scarcely necessary to say the fact that the city chose to pay $300,000 in 1876 for property which Van Norden bought in 1872 from the Ship Canal Company for $50,000, is not one which can be considered here. The Act of 1876, authorizing the purchase and the settlement of claims against the city, provided for the appointment of an appraiser to estimate the value of the rights and things to be purchased or settled for. This appraiser was appointed and appraised the dredgeboats and machinery at $153,750, being twenty-five per cent. less than the original cost. He announced himself as unable to come to a conclusion with reference to the damages claimed. It must be borne in mind that the consideration of $300,000 was fixed upon not only to cover the value of the property of the plant, but *the exclusive franchise* under the Act of 1871, *and the claim for damages against the city.*"

No. 281.

Brf. of Rouse & Grant for

Office Supreme Court, U.S.
FILED
DEC 8 1900
JAMES H. McKENNEY

Filed Dec. 8, 1900.

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 281.

CITY OF NEW ORLEANS, PETITIONER,

versus

JOHN G. WARNER, ET ALS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS.

STATEMENT.

The original bill (R. p. 1) filed in this case by John G. Warner in behalf of himself and all others holders of drainage warrants similarly situated, was brought on three drainage warrants, part of the whole amount issued in payment of the consideration of the agreement of sale and compromise executed on the 7th of June, 1876. The city in its answer to the bill (R. p. 20), did not set

up any objection to the validity of this agreement, but on the contrary, alleged that (R. p. 24) "the General Assembly of the State of Louisiana by Act No. 16 of 1876 was constrained to dispense with the service of the company and its assignee (Van Norden), and to authorize the purchase by this defendant, of the dredge boats, rights, franchise, and other property of the company for a price in drainage warrants, delivered to Warner Van Norden, the said assignee, payable only from drainage taxes, and this act was followed by said purchase from and surrender of the franchises by said company, and its assignee, as shown by the said legislative act, and act of purchase, a copy of which is filed with the bill, to which reference is made."

The regularity of the agreement and its validity in law and fact were not denied, nor was it claimed that the enabling act of 1876 did not authorize the city to make the agreement and issue the warrants in discharge of its considerations; nor that the damages had not been appraised.

The Circuit Court of Appeals passed upon all the defenses pleaded in the answer, and found and decreed (R. p. 90) that the city was indebted to the complainant Warner for the amount of the three warrants issued under the agreement, payable out of drainage assessments; decreed that the drainage assessments and taxes were a trust fund in the hands of the city for the purpose of paying the complainant and other holders of the same class of warrants issued under the act of sale from Van Norden, transferee, to said city, under authority of the Act 16 of 1876, and ordered an account taken of the taxes; ordered notice to be given by the Master to all holders of warrants so issued, to establish their claims before him, and that all persons who shall establish their claim will be entitled to absolute judgments for the amounts found due them, and be entitled to the full benefit of the proceeding. This decree (R. p. 99) was affirmed in all respects by this court in New Orleans vs. Warner, 175 U. S. 120.

The appellees established their claims, all based on warrants of the same class as those held by Warner, issued in payment of

the consideration of the agreement of sale and compromise, which were allowed by the Master. To this allowance the city filed before the Master, substantially, the following exceptions (R. p. 108):

1st. That the Master erred in charging the city with the whole of the uncollected assessments against private persons and property. (But this has been abandoned.)

2nd. That the advantages of the decree of reference, extend only to such warrants as were issued in payment of the price of the property purchased by act before Legardeur, Notary Public, dated June 7, 1876, amounting to $153,750, as shown by the inventory and appraisement of T. S. Hardee, City Surveyor; that the balance of the warrants issued under said act were not purchase warrants in the sense of the opinion and decree of the Court of Appeals and of the Supreme Court; that such balance of said warrants were mostly issued in settlement of a claim for damages; that of said warrants $20,000 were issued in payment of work, done by Van Norden in digging canals which had not been measured at the time of the passage of said act, as to which the decision in Peak vs. New Orleans is *res adjudicata* in favor of the city; that no warrants issued in excess of the value of the tangible property should be considered as coming within the said opinion and decree of this court and of the Court of Appeals.

These exceptions were renewed in the Circuit Court (R. p. 143), with the modified statement that the $20,000 of warrants were issued in satisfaction of drainage taxes collected and appropriated by the city for its general purposes.

It is to be noted here that the only objection made to the allowance of warrants supposed to have been issued in settlement of the claims for damages and misappropriation of drainage taxes, is, that such claims do not come within the decision and decrees of the Court of Appeals, as affirmed by this court. But the exceptions do not charge or allege as a ground of defense that the city did not have authority under Act 16 of 1876, to settle and pay the claims, and purchase the franchises of the Canal Company, nor

that there was no valid or sufficient appraisement of the damages.

The Master was of the opinion (R. p. 106) that this court in adjudging in favor of Warner, necessarily decided the validity of all the warrants issued in discharge of the consideration of the agreement, the holders of which had come in and accepted the benefit of the decree; and further that Section 1 of Act 16 of 1876 conferred upon the city ample authority to compromise all claims of the Canal Company, and its transferee, arising out of its execution of the work under the provision of Act 30 of 1871, even if the question had not been already determined by this court, and accordingly overruled the exceptions of the defendant to his report. The Circuit Court, following the report and opinion of the Master, but without filing a written opinion, overruled the exceptions, and made the decree in favor of the warrant holders, now sought to be reviewed here.

The city appealed to the Circuit Court of Appeals, assigning, in substance, the following errors (R. p. 150):

1st. That the Circuit Court erred in overruling its exceptions to the Master's report.

2nd. That only the warrant issued in payment of the price of the tangible property purchased under the agreement, and appraised at $153,750, pursuant to Act 16 of 1876, should be admitted as debts or liabilities of the city; and that warrants issued in excess of said amount, not being purchase warrants, should be excluded from the benefits of the decree.

3rd. That the warrants for $20,000 issued in satisfaction of drainage taxes collected and appropriated by the city, not being purchase warrants in the sense of the decision of the Supreme Court, were not entitled to the benefit of that decision.

4th. That all of the warrants issued in excess of $153,750 (the value of the tangible property), for damages, etc., were issued without authority of law, the said Act 16 of 1876 furnishing no authority therefor; and that even if it were otherwise, there was no appraisement of the damages, which was a condition precedent

under said Act, to any settlement thereof; that so far as any of said warrants may have been issued in payment of the price of the franchises, the same was a pure fiction, as the acquisition thereof was the assumption of a burden, and not the acquisition of property of value. That the court should have refused to allow any warrants in excess of $153,750.

5th. That the court should have allowed said warrants, in numerical order, up to $153,750, and rejected all others.

6th. That the Circuit Court erred in refusing to separate in this manner, the valid from the illegal warrants, and in dealing with the whole issue as a unit.

7th. That the Circuit Court erred in holding that the question raised by the exceptions to the Master's report were decided adversely to the city by the prior decrees of the Circuit Court and Supreme Court in this cause.

The assignments made here, in the petition for *certiorari* (R. p. 80 to 89), are substantially the same.

It will be observed that but two defenses to the claims of the intervenors were set up in the exceptions filed by the city to the Master's report, which were subsequently renewed in the Circuit Court. 1. That the advantages of the decree of reference, extend only to such warrants as were issued in payment of the price of the tangible property, as shown by the appraisement, amounting to $153,750, and that the balance of the warrants issued in settlement of the claims for damages, not being purchase warrants, in the sense and meaning of the opinion and decree of the Circuit Court of Appeals, and of the Supreme Court, are not entitled to the benefit thereof. 2. That the $20,000 of warrants issued in satisfaction of drainage taxes misappropriated by the city being for taxes collected prior to June 6, 1876 (the date of the purchase), they should not be allowed, and that in any event, the decree in Peak vs. New Orleans in No. 11,614 U. S. Circuit Court, is *res adjudicata* in favor of the city.

The exceptions filed to the Master's report, subsequently re-

newed in the Circuit Court, as will be seen from a casual examination of them (R. p. 108), set up no new or special defenses to the claims of the intervenors in addition to those contained in the answer to the Warner bill, common to all the warrants. They merely protested that the intervenors were not entitled to the benefit of your Honors' decision in New Orleans vs. Warner, 175 U. S. 120. The Master and the Circuit Court therefore tried and determined the claims of the intervenors on the same proofs, and upon the same issues of law and fact which were the basis of the decision of this court in the above case.

But in the assignment of errors filed on its appeal from the decree of the Circuit Court (R. p. 150), the city, for the first time, alleged that the Act of 1876 did not authorize it to compromise the claims for damages, and that if it did, there was no appraisement of the damages which was a condition precedent to a valid contract of compromise. As these defenses were imported into the record by the assignment of errors on the appeal taken to the Court of Appeals after the final decree, they were never brought to the attention of the Master nor to the judge of the Circuit Court, nor passed on by them. The Court of Appeals, for this reason, did not consider them, and affirmed the decree of the Circuit Court. The city now complains here that the Master and the two Courts below, erred in the rulings they are supposed, or assumed, to have made on these two defenses, which were not legally brought to their attention as issues in the case, and which they were not required to consider or decide.

Argument.

I.

The exceptions filed by the city to the report of the Master, and renewed in the Circuit Court, amount simply to a protest, or argument, that the holders of the warrants supposed to have been issued in discharge and compromise of the claims for damages, and for the misappropriation of drainage taxes, are not entitled to the

advantages of the decision of this Court rendered in favor of John G. Warner on the warrants of the same kind and class held by him.

The city admits in the exceptions, that the warrants supposed to have been issued in payment of the price of the dredge boats and machinery, numbered from 313 to 333, and amounting to $153,750, are valid, and that it is bound in respect to these warrants by the decree in favor of Warner, and the decision of this Court affirming the same, as found in New Orleans vs. Warner, 175 U. S. 120; but insists that it is not bound as to the warrants numbered from 334 to 402, supposed to have been given in compromise of the claims for damages and for misappropriation of drainage taxes.

The exceptions set up no special defenses in addition to those alleged in the answer to the Warner bill, which was based on the warrants Nos. 379, 380, 381 (given, according to the theory of appellant, for part of the claim for damages), upon which the former decree of the Court was rendered.

The case was, therefore, necessarily tried before the Master and in the Circuit Court, as between the city and the intervenors who held other than the alleged purchase warrants, solely upon the defenses set up in the answer to the Warner bill, coupled with a protest that the decision of this court in the main cause was not binding on the city as *res adjudicata*. The case was heard upon the same evidence (List of evidence, R. p. 141), and the same issues of law and fact, upon which this court affirmed the decree rendered in favor of John G. Warner and all other holders of warrants of the same class. As the Warner warrants in numerical order fall within those issued, according to the theory of the city, for damages and misappropriation of drainage taxes, it is difficult to see why all that class of warrants are not entitled to the full benefit of the former decision of this court.

If the decree affirmed in New Orleans vs. Warner, 175 U. S. 120, is not strictly an adjudication in favor of all holders of the warrants issued in discharge of the consideration of the agreement

of purchase and compromise, the decision of this court upon the same facts and issues, is most certainly *stare decisis*.

It is true that the question of the validity of the warrants supposed to have been issued otherwise than for the price of the dredge boats and machinery, was not expressly decided by this Court on the former appeal, but this was because that question was not raised by the defendant's answer, which admitted their legality without qualification, by alleging that the city purchased "the rights, franchises and other property" of the Canal Company and Warner Van Norden, transferee, under the contract of June, 1876, by authority of the Act No. 16 of the Legislature of Louisiana (R. p. 24).

The case of the intervenors having been tried upon the same issues of law and fact before the Master and the Circuit Court, the Court of Appeals was, therefore, clearly right in holding that the city was concluded by the decision of this court on the similar warrants involved in the Warner appeal. Decrees rendered in cases of this character have always been held to be for the benefit of all others similarly situated, in behalf of whom the bill was brought.

The rule is clearly stated by the court in Hammond vs. Hammond, 2 Bland (Md.), 362, as follows: "The principle in such cases is that, substantially, a bill by a creditor in behalf of himself and all others, or a suit by any one in which all the creditors may be represented, and allowed to come in and obtain satisfaction, is considered as making all of them parties to it, and that the decree is in the nature of a judgment for them all."

Brook vs. Gibbons, 4 Page 374.

Thompson vs. Brown, 4 Johns. Ch. 619.

Kerr vs. Blodgett, 48 N. Y. 62.

This principle is recognized in the case of Richmond vs. Ivens, 121 U. S. 27, where this court held that the filing of a bill by one creditor for himself and in behalf of all others for the administration of the estate of a debtor, operates as a suspension of the statute of limitations as to the claims of all who come into the cause

and claim the benefit of the proceeding. Suits of this character are of the same class as those brought by one inhabitant to establish in behalf of all a right of common against the Lord of a manor, or a right of fishery. On this subject, we refer the court to the exhaustive discussion and review of the decisions to be found in Vol. 1 of Pomeroy's Eq. Jur., p. 243, under the head of "Multiplicity of Suits".

See also opinion of Mr. Justice Harlan in Osborn vs. Wisconsin Central R. Co., 43 Fed. Rep. 824.

We do not claim that a decree in such cases in favor of the complaining party would cut off any special defenses the defendant might have against a particular creditor, but it seems to us clear, on principle, that the decree must be held conclusive as to every issue common to all, which has been necessarily litigated and determined, otherwise such a decree decides nothing, and is but the beginning of a new contention with every intervenor, actually creating, instead of preventing multiplicity of suits.

In the present case all the warrants, although each is numbered and for a different amount, were issued as a unit in discharge of the consideration of a single contract, and delivered to Warner Van Norden, from whom the present holders derived title. Whatever defenses the city has to one of these warrants is applicable to all. These having been fully heard and decided in the Warner appeal, and no new or special defenses having been set up since against the intervenors, the decision ought to be final and binding on the city, and we submit that the Court of Appeals did not error so holding. One of the errors assigned by the city in its petition for the former writ of *certiorari* (R. p. 79, par. 17), complained that the Court of Appeals erred in giving the advantage of the decree to the holders of the other warrants similar to those of Warner. Yet this court affirmed the decree (R. p. 99), and necessarily considered and decided this very question.

The only new and special defense made in the exceptions filed before the Master was to the allowance of sixteen thousand dollars

of warrants, part of the $20,000 issued in settlement of the misappropriation of $24,000 of drainage taxes collected and misappropriated by the city, on the ground that these warrants were not purchase warrants, within the sense of the former decision; and that the decision in the case of Peake vs. New Orleans was *res adjudicata* (R. p. 143). But of what it is *res adjudicata* is not stated, nor is it alleged that any of these warrant holders were parties to that cause.

The Master was therefore perfectly correct in overruling the exceptions as to these warrants, and so was the Circuit Court in confirming his report.

II.

As the case of the intervenors was tried before the Master, and in the Circuit Court, upon the same issues, and upon the same proofs that were before this court in the Warner appeal, we submit that the Circuit Court of Appeals was entirely correct when it declared that the whole case had been decided by your Honors in New Orleans vs. Warner, 175 U. S. 120, notwithstanding the protest of the city in its exceptions to the Master's report that the intervenors were not entitled to the benefit of that decision.

It would seem that the city did not discover the fallacy of its contention until after the case had been tried in the Circuit Court. Then, for the first time, as an afterthought, it set up two new and special defenses in the assignment of errors filed in its appeal from the decree of the Circuit Court (4 errors, R. p. 150), to the effect that the Act of 1876 did not authorize the city to compromise the claims for damages, and that the damages had not been appraised; and complained that the Circuit Court erred in not sustaining them. It is also complained here that the Court of Appeals erred in not reversing the decree of the Circuit Court on these grounds. As these defenses were not set up in the answer to the bill, nor in the exceptions before the Master, which were renewed in the Circuit Court, and were not brought to the attention of the trial

court, nor passed on, it is elementary that they cannot be made the basis of any reversible error in an appellate court.

The proposition that new defenses cannot be imported into a case for the first time in an appellate court, is so firmly established in our jurisprudence as to hardly need argument in support of it. Where such supposed and fictitious defenses have not been passed on by the trial court, there is nothing in the record open to review here.

Where the record shows that a particular ground of defense raised for the first time in the Supreme Court, was not brought to the consideration of the Circuit Court, it will not be considered here.

Bell vs. Bruen, 1 H. 169.

In a patent case it was insisted here that a reissue was void because it was not for the same invention as the original patent, but the Court refused to consider it, on the ground that the point not having been taken in the Court below, there was nothing to be reviewed here.

Kline vs. Russell, 19 W. 433.

So where the only issue made in the Circuit Court was whether certain imported strips of iron were band iron subject to a duty of 35 *per cent. ad valorem*, it was held that the plaintiff could not here raise the question whether it was subject to a specific duty of 1¼ cents per pound, the question not having been raised in the Court below.

Badger vs. Ranlett, 106 U. S. 255.

In the case of Coffey vs. United States, 116 U. S. 436, the plaintiff raised the question of the sufficiency of an information *in rem* for the violation of the internal revenue laws, by an assignment of errors filed here, but the court held that this question could not be considered, as it had not been formally raised in the Circuit Court.

Says the Court in Ansbro vs. United States, 159 U. S. 695:

"An assignment of errors cannot be availed of to import

questions into a cause which the record does not show were raised in the court below, and ruling asked thereon, so as to give jurisdiction to this court, under the 5th Section of the Act of March 3, 1881."

Cornell vs. Green, 163 U. S. 75.

Muse vs. Arlington Hotel Co., 168 U. S. 430.

The answer of the city, as we have shown, admitted the execution of the agreement of purchase and compromise under authority of the Act 16 of 1876, without pleading that it was *ultra vires*, or suggesting that there was not a sufficient appraisement, so that no defense was made or decided on these grounds in the Circuit Court, nor were these questions raised by the exceptions filed to the Master's report which set up no new defense, but merely protested that the intervenors were not entitled to the advantages of the former decision of this court.

Exceptions to a Master's report are treated as in the nature of a special demurrer, and must state article by which the parts of the report intended to be excepted to. Only the specific errors thus pointed out will be considered. They constitute the issues to be tried.

Story vs. Livingston, 13 Pet. 359.

"This Court will not review a Master's report upon objections taken here for the first time".

McMicken vs. Perin, 18 H. 507.

Commenting on this rule stated in McMicken vs. Perin this court said in Topliff vs. Topliff, 145 U. S. 156, that,

"In affirmance of this principle Rule 21 (Sec. 2) requires that 'when the error alleged is to a ruling upon the report of the Master, the specification shall state the exception to the report and the action of the Court upon it.'

"This presupposes that the particular exception relied upon was taken in the court below and was passed upon by the court adversely to the appellant." Ibid, p. 173.

In the present case the exceptions to the Master's report only raised the question whether the former decision of this court was

applicable to all the warrants issued in discharge of the consideration of the agreement of purchase and compromise, or should be limited to the particular warrants supposed to have been given for the dredge boats and machinery. The purpose sought to be accomplished was to induce the Master and the lower court to evade the decision of your Honors, and to come to a different conclusion upon the same issues of law and fact previously determined against the city in the Warner appeal, on the theory that your Honors meant to limit your rulings to warrants given for the price of the dredge boats and machinery, although it is admitted that the warrants then before you were, according to the theory of the city, given in part settlement of the claim for damages.

As the case of the intervenors was tried before the Master and the lower courts upon the answer to the Warner bill, and the exceptions not presenting any new defenses, these courts were bound to obey the mandate of your Honors, and to make a decree in conformity to your opinion. They had no power to open the controversy decided by this court, to a new contention upon the same record, as if it had never been passed on by this court. So far as Warner is concerned, the lower court could not allow an amendment to the pleadings to let in a new ground of defense for the purpose of evading the mandate of this court.

Gaines vs. Rigg, 148 U. S. 228.

As to the intervenors it may be conceded that their claims were open to any special defenses not at issue or decided in the Warner appeal. No special defenses were presented, however, this case having been decided on the original bill and answer, and the same evidence offered against the Warner warrants. The arguments now made only are different, but they would have been equally applicable to Warner.

This court having decided every question of law and fact raised by the pleadings filed in the court below, those courts simply did their duty in entering a decree in accordance with the opinion of your Honors, as expressed in the former appeal. The lower courts could not rightfully evade the decision and come to

a different conclusion from your Honors upon the same issues of fact and law, if they had been inclined to do so. They were not at liberty to permit a plea to be filed after the case was remanded by this court, raising new questions of law, but were bound to enter and execute the decree as directed in the mandate.

Coffin vs. Taylor, 116 U. S. 567.

They could not review the decision of this court and evade its application on any theory that this court made an error in its rulings. Even your Honors will not do this. Says the court, in Clark vs. Keith, 106 U. S. 464, "it has long been settled that whatever has been decided here on one writ of error, cannot be re-examined on a subsequent writ of error brought in the same suit," citing Supervisors vs. Kennicott, 94 U. S. 498.

III.

But if we are wrong in these contentions, and if it shall appear to the court that the case of the intervenors was open upon the same issues of fact and law decided by this court on the Warner appeal, to a new and a different judgment in the Courts below, and that the city was entitled to import new defenses into the record by the assignment of errors filed in the Court of Appeals, and to have them considered and passed on, we still insist that the decree appealed from is correct.

These defenses are: (1) That Act No. 16 of 1876 did not authorize the city to compromise or settle the claim for damages which entered into the consideration of the agreement under which the warrants in dispute were issued; (2) that if the Act gave such authority, it was upon the condition precedent that there should be an appraisement, which was not complied with by the city, as to damages and misappropriation of drainage taxes, to that extent rendering the agreement invalid.

The two Sections of Act No. 16 of 1876, involved in these contentions, are in the following words:

SECTION 1. "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE

OF LOUISIANA IN GENERAL ASSEMBLY CONVENED, THAT THE COMMON COUNCIL OF THE CITY OF NEW ORLEANS IS HEREBY AUTHORIZED AND EMPOWERED TO TRANSACT AND CONTRACT WITH THE MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY, AND THE TRANSFEREE THEREOF, FOR THE PURCHASE AND SETTLEMENT OF ALL OR ANY RIGHTS, FRANCHISES AND PRIVILEGES CREATED, AUTHORIZED OR ARISING IN FAVOR OF SAID COMPANY OR SAID TRANSFEREE UNDER AND BY VIRTUE OF ACT No. 30 OF ACTS OF 1871; ALSO FOR THE PURCHASE AND TRANSFER TO THE CITY OF NEW ORLEANS OF ALL TOOLS, IMPLEMENTS, MACHINES, BOATS AND APPARATUS BELONGING TO SAID COMPANY, OR ITS TRANSFEREE, AND BY IT OR HIM USED FOR OR PERTAINING TO DRAINAGE WORK AUTHORIZED TO BE DONE BY SAID ACT 30."

SECTION 2. "BE IT FURTHER ENACTED, ETC., THAT SHOULD IT BE DEEMED ADVISABLE BY SAID COUNCIL TO MAKE SUCH PURCHASE AND SETTLEMENT, IT SHALL BE THE DUTY OF SAID COUNCIL OF THE CITY OF NEW ORLEANS TO PROVIDE, BY ORDINANCE, FOR THE APPOINTMENT OF APPRAISERS TO ESTIMATE THE VALUE OF THE RIGHTS AND THINGS TO BE PURCHASED OR SETTLED FOR, AND THE DUTIES AND POWERS OF SAID APPRAISERS SHALL BE SPECIFICALLY ASSIGNED IN SAID ORDINANCE."

Pursuant to this Statute, the following ordinance was adopted by the city:

"BE IT ORDAINED, THAT IN ACCORDANCE WITH THE PROVISIONS OF ACT 16, APPROVED FEBRUARY 24, 1876, THOMAS S. HARDIE, CITY SURVEYOR, BE AND HE IS HEREBY AUTHORIZED AND INSTRUCTED TO MAKE A THOROUGH EXAMINATION

OF THE CONDITION AND VALUE OF ALL THE DREDGE BOATS, MACHINERY, TOOLS AND APPURTENANCES BELONGING TO THE MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY, OR TRANSFEREE, AND USED FOR THE EXCAVATING OF CANALS OR BUILDING PROTECTION LEVEES, MAKING A REPORT TO THE COMMITTEE OF THE WHOLE, TOGETHER WITH A STATEMENT OF ALL INFORMATION IN THE POSSESSION OF HIS OFFICE, CONCERNING DAMAGES CLAIMED BY SAID MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY, OR THE TRANSFEREE THEREOF."

As to the first contention, it seems perfectly clear that the authority of the city to compromise and settle these claims for damages and for misappropriation of drainage taxes was granted in terms quite as explicit as is usually done in legislative acts.

The city was authorized to transact and contract with the Canal Company and its transferee for the purchase and settlement of the rights, franchise and privileges, created, authorized or arising in favor of the Canal Company and its transferee, under and by virtue of Act 30 of 1871, and also to purchase all tools, implements, machines, boats and apparatus belonging to the Canal Company or its transferee.

The rights to be compromised and settled for consisted: (1) Of the franchise of the Canal Company, created by the Act of 1871, under which it was entitled to prosecute the work of drainage, and to receive the compensation therefor fixed by that Act. (2) Of the damages which the Canal Company was entitled to claim in case the city should fail to promptly locate the lines of the canals and protection levees, as provided in Section 6 of the Act. (3) Of the right to require the city to deposit all drainage taxes to the credit of the Canal Company, and to apply the same to the payment of the work done by the Company, as provided by Section 9 of the Act.

Considering that the purpose of Act 16 of 1876 was to permit the city to take charge of the drainage work then being carried on by the transferee of the Canal Company, and that this could only be done by coming to a settlement with the contractors by a compromise of their claims; the word "transact" in the Act was intentionally used to enable the city to accomplish that purpose. The word is not one in common use by laymen, being derived from the civil law in purely legal matters. Thus, under the title "of Transaction or Compromise," Article 3071 of the Civil Code of Louisiana declares that "a transaction or compromise is an agreement between two or more persons who, for the purpose of preventing or putting an end to a law suit, adjust their differences by mutual consent."

The language of the Act was certainly broad enough to enable the city to compromise and settle any claim for damages arising out of the execution of the drainage contract under the Act of 1871. Indeed, this court has already given this construction to Section 1 of the Act, in New Orleans vs. Warner, 175 U. S. 120. The learned Master came to the same conclusion in his report (R. p. 106), which was not excepted to by the city. But in our view of the matter it is not necessary to show that the word "transact," as used in the Statute, is the equivalent of the word compromise, for the Section also authorized the city to "contract" for the settlement of the rights of the Canal Company and its transferee, which, being an unlimited power, was sufficient to authorize the city to compromise those rights.

In commenting on this Statute in New Orleans vs. Warner, 175 U. S. 145, in response to the argument of counsel for the city, this Court said: "The Act of 1876 authorized the purchase and settlement of the claims against the city, and provided for the appointment of an appraiser to estimate the value of the rights and things to be purchased or settled for. This appraiser was appointed and appraised the dredge boats and machinery at $153,750, being 25 per cent. less than the original cost. He announced himself unable to come to a conclusion with reference to the

damages claimed. It must be borne in mind that the consideration of $300,000 was fixed upon, not only to cover the property of the plant, but the exclusive franchise under the Act of 1871, and the claims for damages against the city." If this was the law of the case then as to Warner, it is the law now as to the intervenors who hold warrants of the same class, now alleged to have been given for damages. The former opinion of this court is, therefore, conclusive on the construction of the first Section of the Act of 1876.

We now come to the construction of the second Section of the Act of 1876, which it is claimed, for the first time, required an appraisement of the damages, as a condition precedent to the exercise of the authority granted by the first Section. It is to be noted again here, that neither the answer to the Warner bill, nor the exceptions filed before the Master and in the Circuit Court, deny that an appraisement was, in fact, made, or allege that, as made, it was defective, irregular or void. In fact the answer admits, without disparagement or qualification, that the agreement of purchase and compromise was made, and that all the warrants were issued under authority of the Act of 1876 (R. p. 24), and the exceptions merely protest by way of argument that the intervenors are not entitled to the advantages of your Honors' decision, but set up no special or new defenses. The only complaint against the regularity of the appaisement, as we have shown, was imported into the record by the assignment of errors filed in the Court of Appeals, which has been renewed here.

It is admitted in this assignment of errors that the appraisement of the dredge boats and machinery, made by Hardee, city engineer, was sufficient, and that the first warrants, numbered from No. 313 to 333, supposed to have been issued therefor, up to $153,750, are valid and binding on the city, but it is claimed that the balance of the warrants, numbered from 333 to 402, amounting to $146,250, supposed to have been given for damages and misappropriation of drainage taxes, are void, because these claims were not appraised. The second Section of the Act which directs

the city to appoint appraisers to estimate the value of the things to be purchased and settled for, it seems to us is an anomaly in legislation, and it is difficult to understand why it was inserted. The city was to appoint appraisers of its own selection, without the concurrence of the other party to the transaction, and to prescribe their duties; but neither by the Statute, nor by the ordinance adopted pursuant thereto, was the estimate of values made binding on any one. The sum to be paid was not to be fixed by the estimate of the appraisers, and it could not be, without withdrawing from the city the power granted by the first Section of the Act, to compromise the claims of the Canal Company and its transferee.

The important and material object to be accomplished was to enable the city to acquire the drainage plant, and to obtain a discharge of the claims of the contractor named in Act of 1871, which it was foreseen could only be accomplished by a compromise. This was, no doubt, the reason why the Statute did not provide that the estimates of the appraisers should fix the sum to be paid, as a condition precedent to the validity of the purchase and compromise, as it would have done, if appraisement had been considered a material or essential feature of the transaction. Appraisement was not of the essence of the act authorized by the Statute to be done by the city, for, under the power to compromise, the city was at liberty to pay more or less than the estimated value of the things purchased and settled for. And not being of the essence of the act to be done, it was not one of those conditions precedent, the non-observance of which will render what is done void, unless it is specially so declared in the Statute. The provision of the Statute as to appraisement was, therefore, directory merely, and not mandatory. As we construe this provision of the Statute, its sole purpose was to suggest to the city the appointment of some person who should be qualified to examine into the condition and value of the tangible property, and into any claims the contractors might have arising our of drainage operations under the Act of 1871. We are sustained in this construction by the law itself which left it entirely to the city to prescribe his duties.

The Statute was merely advisory in character, and not intended to either limit the power of the city, or control its discretion. It is within that class of statutes referred to in French vs. Edwards 13 Wall. 506, where the court said: "There are, undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations prescribed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that assigned." Here the rights of no one were to be affected, not even those of the city, which was not bound to adopt the estimate of the appraisers in arriving at the sum it was willing to pay.

The most familiar class of cases in which Statutes directing particular acts to be done are to be treated as mandatory, are those in relation to the assessment of taxes. Tax laws are given this affect because they directly affect the rights of the tax-payer.

Lyon vs. Alley, 130 U. S. 178.
Torry vs. Milbury, 21 Pick. 64.
Sandwich vs. Fish, 2 Gray, 298.
Cooley on Taxation, 216.

These distinctions between directory and mandatory statutes have long been recognized in the jurisprudence of Louisiana, the courts adopting the rule laid down in *French vs. Edwards.*

By a law passed in 1882, municipal corporations were authorized to subscribe to the capital stock of corporations formed to carry on works of public improvements. The third Section provided that no ordinance authorizing such subscriptions should be valid until ratified by a majority of the voters whose property was subjected to taxation; and that the municipal corporations should prescribe the manner of holding the election, and should cause to be furnished to the Commissioner of Election a properly certified

list of the voters, etc. The election was held, but the commissioners were not furnished with a list of voters. Upon being sued by the city for a tax assessed to pay the subscription, a tax-payer pleaded this non-observance of the law as a defense. But the court held the statute directory as to the list of voters, and upon authority cited from cases in England and this country, maintained the validity of the tax.

City of New Orleans vs. Romes, 9 A. 573.

So it has been held that a statutory provision fixing the time within which an act shall be done, is directory merely, and that it may as well be performed afterwards, provided that the rights of no one be lost or prejudiced thereby.

Bell vs. Taylor & Houston, 37 A. 56.

The distinction between directory and mandatory statutes is fully recognized by the courts in most, if not all, of the States of the Union. Where the act to be performed is not of the essence of the thing to be done, and there is no direction, express or implied, that its non-observance shall avoid the transaction, the provision of the statute is considered by the courts of nearly all the States as directory merely.

The People vs. Supervisors, 34 N. Y. 268.
Southerland on Statutory Const., Sect. 446.
Enderlich on Statutory Const., Sect. 436.
Am. & Eng. Enc. of Law, 23rd Vol. 453-8.

The difference of opinion which may be found in the decisions in other States, do not concern us in this case, as the Courts of Louisiana are in full accord with the rule laid down in French vs. Edwards, 13 Wall. 506, quoted *supra*. In none of the cases in the brief for the city is the question discussed or decided.

In the case of McCracken vs. San Francisco, 16 Cal. 620, a sale of real estate made by the city was declared void because the ordinance was not passed by a legal vote of the Council. In Murphy vs. Napa Co. 20 Cal. 102, a contract for extra work was declared void because it was not authorized by an ordinance based on bids invited by advertisement. In French vs. Tachemacher, 24 Cal.

550, the question decided was whether an Act of the Legislature, authorizing a subscription to bonds in aid of a railroad, was constitutional, and it was decided in the affirmative. In Herzo vs. San Francisco, 33 Cal. 145, the Court held that city was not liable to refund the price paid for the real estate involved in 16 Cal. 620, upon failure of title. This decision is contrary to that line of cases holding a municipal corporation liable to refund money unduly received, in an action for money had and received. In McCoy vs. Briant, 53 Cal. 249, the court held the city not liable on bonds issued by the clerk of the Council without the authority of an ordinance, the Statute requiring that they should not be issued without the authority of a resolution of the Council. Most of these decisions were delivered by the late Mr. Justice Field, then on the Supreme bench of California, who was the organ of this court in French vs. Edwards.

The case of Addis vs. City of Pittsburg, 85 Pa. 379, the Court held that where the law requires a contract for municipal work to be let to the lowest bidder, after advertisement, and this is not done, a tax-payer is not bound for an assessment made to pay for the cost of the work. So in Leavenworth vs. Rankin, 2 Kan. 370, it was held that a contract for grading streets was void, if not petitioned for by a majority of the property owners, as required by law. To the same effect in the case of Durango vs. Pennington, 8 Colorado, 259.

The case of Worthington vs. Covington, 82 Ky. 265, involved the validity of assessments against property owners to pay for a street improvement, which was denied because the contract had not been submitted to a committee of the Council.

IV.

If the statute directing an appraisement was mandatory, as contended by the city, we submit that its requirements were substantially and sufficiently complied with.

It seems to us that the law contemplated an appraisement of the tangible property only, and that the city, in the exercise of its

authority to prescribe the duties of the appraiser, did not err in requiring him only to report the facts on which the claim for damages was based.

Appraisement fairly implies the examination of something that can be seen and estimated by the appraiser, who is supposed to have some special knowledge of the thing to be appraised; whereas the value of a claim for damages, or of the claim for the misappropriation of taxes, involved many collateral considerations beyond the view of an appraiser, which could only be determined by the parties in interest.

But we think the appraiser actually estimated the claim for damages when he reported to the city the amount that each dredge boat, which had remained idle on account of the fault of the city, was capable of earning while unemployed, "as a fair estimate of what they would have earned and been entitled to in cubic yards for the whole period of delay." They would have earned the contract price of excavating 149,445 cubic yards at 50 cents per yard, and 50 cents per yard for placing the same in the levees, as allowed by Section 8 of the Act of 1871.

Id certum est, quod certum reddi potest.

The most that can be said is that the appraisement was informal. But as was said by the Supreme Court of Louisiana, in a suit to annul a judicial sale, "unless the plaintiffs can show they have suffered injury by the informality complained of, they ought not to be permitted to attack the validity of the proceeding."

Mullan vs. Harding, 12 A. 563.

How could the city be injured, or in any manner affected by such an informality, in an appraisement, by which, if made in exact form, it would not be bound in fixing the amount to be paid on coming to a settlement and compromise with the transferee of the Canal Company?

V.

That the agreement under which the warrants were issued was in legal effect a compromise of the claims of the transferee of the

Canal Company against the city, as well as a transfer of property, is perfectly clear. It transferred the dredge boats and machinery and the rights, franchises and contracts of the Canal Company, and its assignee, in consideration of the warrants issued, and released, the claim against the city for damages.

This was a mutual settlement of all differences between the contracting parties made pursuant to the statute which authorized the transaction. It was none the less a compromise, although that particular word was not used, and there was no declaration in the agreement, in the language of the Civil Code, that it was made for the purpose of "preventing or putting an end to a law suit," for, in Louisiana, the character of a writing, as elsewhere, is fixed by its evident purpose, and the object sought to be attained by the contracting parties.

Antoine vs. Smith, 40 La. A. 560.

Article 3078 of the Civil Code of Louisiana declares that "transactions have, between the interested parties, the authority of the thing adjudged. They cannot be attacked on account of any error in law, or any lesion."

Article 3079 provides that "a transaction may be rescinded notwithstanding, whenever there exists error in the person, or in the subject matter in dispute. It may likewise be rescinded in cases where exists fraud or violence."

The effect of these Articles of the Code was fully considered in the case of Oglesby vs. Attrill, 105 U. S. 611, in which the Court says: "The compromise stands, therefore, as a judgment making a settlement of the matter now set up as grounds of complaint in the petition of reconvention. No allegations in addition to those made in the settlement can prevent the compromise having effect as a judgment therein. It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally. Adler vs. Proudholm, 16 A. 343."

Under these established rules of law, the city cannot, in this

case, be heard to complain in a collateral way, that the consideration of the agreement was inadequate, or that the agreement was executed in error of law, or fact, and certainly not when these are not pleaded as defenses.

The amount allowed in the settlement on the claims for damages, if any was in fact allowed, is not shown by the proofs. But conceding that the agreement included some damages, their inclusion, at most, was an error of law which is not a ground of rescission. And if it can be assumed, as the city says it ought to be, that $146,250 of the amount paid by the city in warrants under the agreement, represented damages, which were not lawfully allowed, and the city received less than one-half of the assumed value of the warrants, there was lesion, which does not, any more than error of law, afford ground of avoiding a compromise, even in a direct action.

But if the whole transaction were now open for investigation and revision, and the Court could substitute its judgment for that of the city, and make a new contract for the parties, what could it do? It would be bound to find, in any event, that, to the extent of $153,750, value of the dredge boats and machinery, as fixed by the city's own appraiser, whose integrity is not impeached, there was a real consideration for the agreement in money value. Could it find that the warrants, payment of which depended upon contingencies that might or might not happen, exceeded that amount in value at the time the transaction was made, in the absence of any averment or proof in the record as to what they were worth, and in the face of the self-evident fact that warrants of the character of those under consideration have no particular value as commercial paper?

May not the Court assume that the warrants, in reality, represented the value of the tangible property, and that the franchise was conveyed as a mere incident to the plant, and that the release of the claims for damages was an inducement to the purchase of the property and nothing more? And why should the Court impute part of the warrants to the claims for damages, and to the

supposed price of the franchise, in the absence of proof that these things were considered of any value by the parties who made the agreement, and in the face of the contention of the appellant that the damages were fictitious, and that the acquisition of the franchise was a burden rather than a benefit to the city? Having asked the Court to reduce the recovery on the warrants by nearly one-half, the burden was clearly on the city to show how much of the consideration of the contract represents damages, and the value of the franchise, to enable the Court to grant the relief prayed for, if it is entitled to any.

But we think it clear, on principle, that the city is not entitled to relief in the present form of action or in any other. The warrants were issued as a unit, in a lump sum, in discharge of the whole consideration of the agreement of compromise and sale, and cannot be apportioned to separate the several objects included therein. Therefore the city, if entitled to any remedy at all, should have brought suit to rescind the contract, setting up some legal grounds of action, such as that the contract was entered into by error of fact as to the subject matter induced by the fraud of the opposite party, and at the same time offer to restore what it had received.

Farmers Bank vs. Groves, 12 H. 51.
Gay vs. Adler, 102 U. S. 79.

A full rescission of the contract is the only way in which complete justice can be done between parties so situated.

But here it is manifest that the remedy cannot be invoked, because the drainage machinery, which the city has received, cannot be returned so as to restore the *statu quo*.

VI.

In the brief on behalf of the city it is contended that this Court ought now to re-examine its former decree, since we are asking for its execution, and see if it has not committed an error in its decision which ought to be corrected.

The Court is asked to violate the long established rule that whatever has been decided by an appellate court on one writ of error, cannot, in the same suit, be re-examined by the same appellate court, upon another writ.

Coffin vs. Taylor, 116 U. S. 567.

It is, no doubt, true that when the decree of a court of equity is so defective that it cannot be executed, and a new suit is filed to obtain another decree, the court may inquire into the correctness of the former decree, and make a new one in accordance with the real rights of the parties. This practice, however, is based upon the theory that the former decree is no more than an agreement under seal, which, if defective, a court of equity will enforce only according to right and justice. The application of this principle is well illustrated by the two cases cited in the brief of the city.

Thus in Gray vs. Parpart, 106 U. S. 679, the decree of partition contained no provision for a conveyance, *inter partes,* of the interest each was entitled to receive. It was a consent decree, and various agreements were subsequently entered into between the parties without consideration, and interests were acquired by third persons. After a lapse of twelve years, one of the parties brought a new suit to carry the old decree into effect. Under these circumstances it is evident a readjustment of the rights of the parties became absolutely necessary to meet the ends of justice.

In the case of Lawrence Manufacturingg Co. vs. Jonesville Mills, 138 U. S. 552, there was a consent decree which was so incomplete as to require the bringing of a new suit to carry it into effect. But as the court found that the former decree was erroneous, it refused to be bound by it as an adjudication, on the express ground, however, that it was the consequence of the consent of the parties, and not of the judgment of the court.

The rule recognized by these decisions extends only to cases where a *new suit* is brought to obtain the execution of a former decree, and has never been applied by the courts to the decrees of an appellate tribunal when sent down to be executed by the court

below in the same cause; for it cannot be that an inferior court has the right, or the power, to disregard the mandate of its superior and examine its decisions to see if an error has been committed. If this were so, it would be an idle ceremony for your Honors to render a decision in any case, or to issue a mandate. No case has been cited, and none can be found, in support of such a practice.

VII.

Thus far we have discussed the various questions as if, according to the theory of the counsel of the city, they were open in this appeal to a new contention, but we respectfully submit that the whole case has been passed on and decided by this court on the former appeal.

A reference to the bill of John G. Warner will show that it was brought by him, as the holder of three warrants, to enforce the agreement of sale and compromise between the city and the Canal Company and its transferee. The answer of the city practically admitted the validity of the agreement, and of the warrants issued in discharge of its consideration, by averring that "the General Assembly of the State of Louisiana, by Act No. 16 of 1876, was constrained to dispense with the services of the Canal Company, and its transferee, and to authorize the purchase by this defendant of the dredge boats, rights, franchises and other property of the company, for a price in drainage warrants, delivered to Warner Van Norden, payable only from drainage taxes, and this Act was followed by said purchase from and surrender of the franchises by said Company, and its assignees, as shown by said legislative Act, a copy of which is filed with the bill, to which reference is made" (R. p. 24). The only charge made in the answer, concerning the agreement, was that "all of the dredge boats and other property sold to it (the city) by Van Norden, were of little or no value, or, in any event, of a value infinitesimal as compared with the price paid for the same, and that the sale thereof for the price stipulated was a fraud upon this defendant and its tax-payers" (R. p. 32). This defense was

passed on and disposed of adversely to the city by this court, in New Orleans vs. Warner, 175 U. S. 120. All the other defenses set up in the answer went to the validity of the drainage assessments, and the liability of the city to account therefor. These were also decided adversely to the city.

When the holders of the rest of the warrants came before the Master, no special answer was filed to their claims, but they were considered to fall within and be subject to the defenses set up in the answer of the city to the Warner bill. Both parties submitted the claims of the intervenors upon the same proofs that had been used at the former hearing, and it followed, logically, that, as all the warrants were of the same class and kind as those of Warner, the Master, and the Circuit Court, and the Court of Appeals, should come to the same conclusion as this court did on the former appeal, notwithstanding the exceptions filed to the Master's report, that the intervenors were not entitled to the benefit of your Honors' decision. And it seems to us that your Honors must now, upon the same issues of law and fact, adhere to your former ruling. One argument of the city now is, that the two defenses now insisted on—want of authority in the city to compromise the claims for damages, and defective appraisement of the damages—were not presented to or passed on by this Court in the former appeal. This is true, but as we have shown these grounds of defenses were not set up in the defendant's answer. Nor have they been set up in any pleading in the record, to the claims of the intervenors, but were imported into the record for the first time by the assignment of errors filed in the Circuit Court of Appeals, and, therefore, cannot be considered here as grounds for reversal.

Another argument is that the benefit of your Honors' former decision should be limited to warrants issued for the purchase price of the dredge boats and machinery, although it is admitted that the Warner warrants are part of those that were given, according to a fanciful theory evolved by the learned counsel of the city, in part settlement for damages. This limitation it is as-

sumed, is to be inferred from the fact that this court, in the course of its written opinion in the former appeal, sometimes for convenience, referred to the Warner warrants as purchase warrants. But so did the city in its answer to the bill.

It seems to us that this kind of argument but trifles with the opinion of this court. If the lower court had attempted to execute the mandate of your Honors in this narrow and carping spirit, it would have been justly considered guilty of contempt and evasion of the authority of this court.

We think your Honors intended to decide, and did decide, every question in the case involving the validity of the agreement and of all the warrants as a unit, and that your opinion was too well and carefully considered to be now changed upon the suggestions and new arguments, based on pretended errors of the lower courts in their supposed rulings on issues and defenses not submitted to them, or passed on.

VIII.

There is no proof in the record to support the contention of the city that part of the warrants were issued in payment of the price of the tangible property, and part in settlement of damages, etc. On the contrary, it appears from the evidence of S. D. Moody, secretary of the Canal Co. (R. p. 114), and by the agreement, that they were all issued at the same time, and delivered to Van Norden as a unit. Nor is there any proof tending to show which of the warrants were signed first, although they are numbered consecutively from 313 to 402. Therefore it cannot be inferred that those numbered from 313 to 333 were given for the price of the tangible property, and the others for damages, etc., and that they were, for this reason, void, under the theory of the city.

But if part of the consideration of the agreement is rejected on the theory of the city, the amount rejected should be prorated and deducted from the face of all the warrants, and each warrant holder should receive a pro rata of the sum of $153,750, admitted

to be due. This sum should be treated as a trust fund for the benefit of all, and divided equally.

But no reduction should be made, in any event, on the warrants held by Wilder & Co., they having obtained a judgment in the Circuit Court, at law, against the city on warrants Nos. 341 and 402 aggregating $7,000, fixing the amount due them, which is *res adjudicata* (R. pp. 155 to 158). Nor should any deduction be made on the warrants Nos. 379, 386 and 381, aggregating $6,000, held by Anna Warner, Mary G. Warner, Harry Warner and Joanna McCrossion, substituted heirs of John G. Warner, their rights being fixed by the former decree in favor of John G. Warner, deceased, to whose interest they have succeeded as sole heirs at law. Moreover, no appeal has been taken from the separate decree in their favor, they not being named as appellees either in the motion for appeal (R. p. 149), or in the bond (R. p. 152). Nor should the several decrees recovered by John J. Donaldson, on warrant No. 399, for $2,000, be in any manner disturbed, as no appeal has been taken therefrom, his name not being mentioned either in the motion and order of appeal, nor in the bond.

We respectfully submit that the decree appealed from should be affirmed, and so pray.

J. D. ROUSE,
WM. GRANT,
Attorneys for Appellees.

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JAMES H. McKENNEY

No. 281.

Add'l Brf. of Dr Grey for Respond

Filed Dec. 10, 1900.

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS,
PETITIONER,

versus

ANN WARNER ET ALS., HEIRS AT LAW, ETC.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Additional Brief of Respondent on the Question of Whether the Notarial Act of June 7, 1876, was "a transaction or compromise" within the meaning of the Civil Code and the decisions of the highest Courts of Louisiana.

It is contended on the other side that "to transact" does not mean to compromise unless it is followed by the words "to compromise" and that no one familiar with the mode of drafting acts of compromise in Louisiana would ever think of using the words "transact" without following it with the word "compromise", etc.

In Antoine vs. Smith, 40 Ann., p. 560, the language was not near as definite as in the notarial act herein, especially on the

claim for damages and moneys collected and misapplied. The instrument in that case, which the court held was "a transaction or compromise" is found at page 568, and no where contained either of these words. It was as follows:—

> "In consideration for a note from David Dexter Smith, dated September 4th, 1884, for twenty-four hundred dollars ($2400), the surrender of a note which the said Smith holds against me for one hundred dollars, dated September 13th, 1876, and one hundred dollars in cash, I hereby surrender all claims I have to any Louisiana State Lottery stock on the books of said company in the name of David Dexter Smith. I further agree to relinquish all claims and considerations in every form against the estate of the late George Smith, deceased, also to pay any balance, if called for, that the estate of said Smith might be liable for by said George L. Smith's signature to my bond as Treasurer of the School Board for the city of Shreveport, parish of Caddo, State of Louisiana. This being a receipt in full for all demands in any form against the estate of the late George L. Smith, deceased, also any and all claims against David Dexter Smith."

Now compare this with the language used in the notarial act herein in reference to the settlement of the claim for damages (R. p. 39), and the settlement of the claim for drainage collections misapplied (R. p. 41). In reference to the former the following conclusive language was used:—

> "That said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden, in consideration of the sales herein made, and also in full settlement of all existing claims for damages which the said Mississippi and Mexican Gulf Ship Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name individually, ever had, or have now, or may have against the said city of New Orleans. And the said * * * Canal Company, through its president and secretary aforesaid, does moreover by these presents fully authorize the said city of New Orleans to pay the said sum of three hundred thousand dollars in drainage warrants, to the said * * Van Norden".

And in reference to the latter said notarial act declared:—

> "and that inasmuch as it has been claimed that certain col-

lections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same."

In discussing said instrument in Antoine vs. Smith above referred to, the Supreme Court of Louisiana at page 563 said:—

"The provisions of the Code are that a transaction, or compromise is an agreement between two or more persons who, for preventing or putting an end to a law suit, adjust their differences by mutual consent, in the manner in which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. This contract *must* be reduced to writing." R. C. C. 3071.

"Our learned brother of the District Court declined to give effect *as a compromise* to the agreement in question, because it did not contain the phrase, for preventing or putting an end to a lawsuit."

"In *Calhoun vs. Lane,* 39 Ann. 596, we gave effect to an instrument as a compromise, which did not contain these formal words. We can see no good reason why their use should be deemed *essential.* Under our system of practice, nothing is sacramental as a matter of form, unless expressly so declared by statute. The instrument does not contain the phrase, 'and which every one prefers to the hope of gaining, balanced by the danger of losing,' which would seem to be equally important."

"In our view, the only *essential,* as a matter of form, which the article quoted requires is, that 'the contract *must* be reduced to writing.'"

"Without recapitulating the terms, provisions and conditions of the instrument, we hold it to be a transaction or compromise, in the sense of the Code, and was evidently intended for the purpose of *preventing* law suit."

"A transaction has 'a force equal to the authority of things adjudged.' R. C. C. 3878."

"A thing adjudged is said of that which had been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed for appealing is elapsed, or because it has been affirmed on appeal. R. C. 3556, No. 31."

And in response to the plea urged of the great disproportion of the amount received and the value of the property given up, the court said at page 269:—

"The law provides that a compromise cannot 'be attacked on account of error in law, or lesion.' R. C. C. 3078."

"In Davis vs. Lee, 20 Ann. 248, the court said that 'in transactions, as they are defined in the Code, and in the Roman law, there is, from the nature of such contracts, something aleatory.'"

"Pothier, in treating on this subject, says: 'There are certain agreements in which persons of full age are *not* entitled to restitution, be the injury *ever so considerable.* Such are compromises according to the edict of Francis II. These are agreements respecting pretensions upon which there are impending, or *expected* litigations * * * By the very nature of such agreements, the intention of the parties is the avoidance of litigation, even at the expense of what belongs to them.' Pothier Ob., p. 121 (36)."

In Long vs. Robinson, 5 Ann., the court said:—

"'The plaintiff seems to rely to establish both (of his demands) by *the large amount of his claim compared with the small sum of* $3000, *for which they were compromised.* But the Code expressly provides, that a compromise cannot be annulled on account of any lesion—Art. 3045; because it is an agreement to put an end to a law suit, and which the parties prefer to the hope of gaining, balanced by the danger of losing. Code, 3038.'"

"'The plaintiff is, therefore, not only unfounded in the opinion, that the sacrifice he made in the compromise is cause for its rescission, but the District Court properly refused to admit testimony of the value of the property and claims compromised.'"

The term "Lesion" above referred to is defined by the Civil Code of Louisiana as follows:—

"Art. 1860. Lesion is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. The remedy given for this injury, is founded on its being the effect of implied error or imposition; for in every commutative contract, equivalents are supposed to be given and received."

And commutative contracts are defined by said Code, Art. 1768, to be:—

"Art. 1768. Commutative contracts are those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given, or promised by the other."

While aleatory contracts are defined by the same Code as follows:—

"Art. 2982. The aleatory contract is a mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to one or more of them, depend on an uncertain event."

In Calhoun vs. Lane, 39 Ann., at page 606, the court said:—

"This kind of contracts" (transactions or compromises) "is clearly distinguishable from that in which equivalents are respectively given and received."

"It was correctly observed by our predecessors that 'in transactions as defined in the Code and in the Roman law, there is, from the nature of such contracts, something aleatory.' 20 Ann. 248.

* * * * * *

"In Long vs. Robinson, suit was brought to annul a transaction on the ground that there was great inequality in their respective shares and interests, and the court held that such a claim was unfounded, and declined to listen to evidence in support of it."

* * * * * *

"There is no precept of the law that requires evidence to support an act or compromise. This would of itself destroy its effects as a transaction. It could not then be said to have a force equal to the authority of things adjudged. It would then be deprived of its character as an unappealable judgment, and reduced to the rank of conventional obligations and commutative contracts. If it be necessary to prove *aliunde* that there was an *adequate* consideration, then it would *eo instanti* cease to be a compromise. If proof is necessary to show that the contract turned to her *advantage*, the provisions of the Code would be violated, and by its reception the jurisprudence would be trenched upon."

Respectfully submitted,

RICHARD DEGRAY,
Counsel for Respondents.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

ANN WARNER ET AL., RESPONDENTS.

CERTIORARI TO CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

SUPPLEMENTARY BRIEF FOR RESPONDENTS.

FIRST. It would seem clear that the decree of the circuit court, so far as not appealed from, must stand.

The appeal is allowed generally "upon respondent," *i. e.*, the city, "furnishing a bond, conditioned according to law, in the sum of $5,000, with good and solvent security" (p. 149).

The bond given and required as a condition of appeal runs to certain persons named, and does not run to John J.

Donaldson or to Ann Warner, Joanna E. McCrossin, Mary E. Warner, and Harry Warner, the legal heirs of John G. Warner (p. 146, sub. third; and for bond see p. 152). Further, these persons are not named in the petition to this court for the writ of certiorari from this court (p. 80). Therefore the decree in favor of these parties cannot be disturbed.

SECOND. Petitioner claims that, as against certain claims presented before the master, he can raise and has raised certain points which he says he did not raise in the hearing resulting in the decree, and that such points are fatal to such claims.

In fact, petitioner has not raised such points now.

The two points on which he now relies are: 1. That the act of 1876, number 16, gave no authority to the city to settle claims or to do anything but purchase the dredge-boats, and that all warrants issued in excess of the appraised value of the dredge-boats, $153,750, are void. 2. That under the act appraisement is a condition precedent, and that no appraisement was had as to anything but the dredge-boats.

The record shows that no such points were made before the master or passed on by him.

The exceptions to the master's report are on page 108, and disclose the objection that the *advantages* of the *decree* extended only to warrants issued for property up to $153,750, and not to others.

In other words, the exception to the master's report raised a question of construction of *the decree* herein and raised no question of construction of act number 16.

Not a word is said as to authority of the council under the act to issue warrants for anything beyond the value of the boats, and not a word is said as to appraisement.

It seems that the master first made a report (pp. 102–106). To that report petitioner filed certain exceptions (p. 108). The master then filed a supplemental report (pp. 106–108), and to that petitioner filed further exceptions (pp. 143,144).

In these exceptions, as in the others, the point raised by petitioner is "that the *advantages* and the *decree* herein under which this reference is made extend only to such warrants as were used in payment of the property purchased."

Not a word as to lack of authority—not a word as to appraisement. The point, as before, was construction of the *decree*, not of the *statute*.

On those exceptions and on the testimony taken before the master (pp. 109 *et seq.*) the cause was heard by the circuit court and its decree was made (pp. 145 to 148).

From this decree an appeal by the city was allowed (p. 149) and an assignment of errors filed in the court of appeals, wherein for the first time lack of authority under the statute and lack of appraisement are assigned as error.

Now, if petitioner's claim, that the question of the authority of the city to contract beyond $153,750 was not passed upon or adjudged in this court on the prior certiorari, reported in 175 U. S., be sound, our claim surely is equally sound that the point was never taken before the master or before the circuit court and was never passed on by them, and hence could not be assigned for error in the circuit court of appeals, and could not have been passed upon or adjudged in that court and cannot now be entertained in this court.

For authorities see brief of Mr. De Gray, pp. 16 *et seq.*

THIRD. The rights of the holders of warrants for the sums exceeding $153,750 were directly adjudged in this court on the former certiorari, reported in 175 U. S. Reports.

The three warrants held by John G. Warner, and which this court adjudged should be paid, were of that very class and number, viz., those issued after more than $153,750 par value had been issued, and the direct judgment of this court, and of all the courts below acting on the mandate of this court, was that on those three warrants the city was indebted to Warner $6,000 and interest.

That the drainage assessment was a fund to pay those identical warrants and to pay other holders of the *same class of* warrants.

No difference between the warrants now objected to and the three of complainant specifically adjudged is alleged or suggested by petitioner, nor is it contended by petitioner that the decree in favor of complainant on his specific three warrants can now be in any way disturbed.

Indeed, in his brief on application for the writ herein counsel for the city says:

"That Warner's warrants are entitled to be paid out of the fund is now beyond question" (pp. 11, 12).

So that if his contention should now prevail, we would have this court in the very same case adjudging that the three Warner warrants are valid and must be paid out of the fund, and that a lot of other warrants of precisely the same kind held by others are invalid and cannot be paid out of the fund, and for a reason which applies with absolute precision to the Warner as much as to the other warrants.

Such a result would be, to say the least, funny.

26235

FOURTH. The City of New Orleans claims to escape from the direct adjudication of this court that holders of the same class of warrants must be paid, on the ground that claimants coming in under the decree are new parties, and that the question is a new question.

Neither is true.

This bill is filed against a fund in the hands of a trustee to charge the trustee with having the fund and to distribute it among its *cestui que trust.*

The difficulty of *parties* in such a case was in early days presented and the method of pleading in behalf of all others similarly situated was resorted to.

The "others similarly situated" were never regarded as strangers. They always had the advantage and benefit of the decree rendered. What was then decreed could never be relitigated as to them, neither on the same or new argument, and the only thing that can now be litigated by the city in respect to any of these warrants is: Are they the same class of warrants on which Warner recovered? If so, so far as the liability of the drainage fund to the holders is concerned, they must be paid, and the only defense permissible must be of a character different from any question of the original liability of the fund to pay that warrant, and because of something that has happened since.

The very authorities cited by the petitioner show this.

See 2d Danl. Ch. Pr., p. 1210, star paging.

The general language used is based on a decision that if a claim was barred by the statute of limitations before *decree* passed, it could not be proved.

This is very far from allowing the decree itself to be relitigated; but, such as it is, note A shows that it is not law, and that the *filing of the bill* is the date at which the statute must have run.

The filing of the bill in this case was therefore the commencing of a suit by every owner of a warrant. Such owner was a party to the suit, and all defenses applying generally to the class of warrants must be set up in the answer or they are barred.

In the thousands of cases of this kind none can be found where the defendant was allowed, as against one coming in under the decree, to relitigate as to such person questions which had been adjudged by the decree.

See also 1st Danl. Ch. Pr., pp. 239–241–243–245, 246, star paging.

See also *Ex parte* Jordan, 94 U. S., 252.

Suits of this kind relieve from the objection of want of parties and are intended so to do.

There could be no relief from that objection, were the contention of petitioner upheld.

Nashville R. R. *vs.* Orr, 18 Wallace, 471.

McArthur against Scott, 113 U. S., 340.

The cases as to the effect of prior adjudication, where the new suit was on a different cause of action, as in Cromwell against County of Sac, have no application.

This is not a new suit on a different cause of action or with different parties. It is not a new suit at all.

The claimant was a party from the commencement, and

has nothing to do but to prove himself the owner of such a warrant as is described in the decree.

FIFTH. As *res nova*, the warrants objected to are entitled to participate in the distribution of the fund.

The question is: What is the law of Louisiana as to the validity of these warrants?

As evidence that they are valid, we have—

1. The decision of this court as to precisely similar warrants, viz., the Warner warrants, adjudged to be good.

2. The decision of the circuit court of the United States and of the court of appeals in the suit brought by Wilder & Co. (See pp. 155 to 160, inclusive.)

The claim of Wilder & Co. before the master shows that the numbers of their warrants were 341 for $5,000 and 402 for $2,000, and the list of warrants put in evidence by petitioner (pp. 137, 138) shows that both warrants were preceded by warrants to the amount of $190,000.

It would seem as if the question might be considered as settled by authority.

But let us take the act.

The first section authorizes the city to transact and contract * * * for the purchase and settlement of all or any rights, franchises, and privileges created, authorized, or arising in favor of said company; also for the purchase of tools.

Now, what were the rights, etc., to be thus purchased and settled for?

They were those conferred by act 30 of 1871.

They had the right to do certain drainage work at certain prices, which the petitioner now claims were extravagant, and petitioner was bound to pay those prices (see section 8).

By section 6 they had the right to certain damages for failure on the part of the board of administrators to do in time the things by the act required of them.

These were rights under the act of 1871. That act, in other words, gave to the Ship Canal Co. the monopoly of doing certain necessary drainage work at very profitable prices.

These rights were part of those settled for and transferred by the Ship Canal Co. and its transferee to the city under act 16 of 1876.

The transfer was not alone of the franchise; that was the least part of it; it was of the monopoly of doing drainage work, and at the price fixed, and of all the rights which to that date had accrued in the doing of such work.

Construing act No. 16 in the light of rights given by and acquired under act No. 30 of 1871, it is clear that it was intended by act No. 16 of 1876 to give to the city power to settle so as to free itself from all obligation under act No. 30 of 1871.

The city of New Orleans so construed the act, for it took from the canal company and Van Norden an assignment of "the rights, title, interest, share, claims, demands, franchises, privileges, contracts, and advantages which the canal company has or may have under and by virtue of act 30 of 1871" (p. 37).

It took also a subrogation to all the "rights, action, and remedies to which the canal company or its transferee

might be entitled under act 30 of 1871, or any other act, and an authority to act the same as the canal company might have acted" (p. 38).

And the city signed a statement that the sale of the said "rights, title, interest, share, claim, demand, franchises, privileges, contracts, and advantages and the sale of the boats, etc., were for the sum of $300,000, payable in warrants" (pp, 38, 39).

Clearly the cotemporaneous construction of the statute by the city and by the canal company was that the statute authorized the full settlement of all claims under the statute No. 30 of 1871, and the city did settle them by buying them, as well as the boats, and paying for the whole a common consideration of $300,000.

This was in 1876.

From that time until the filing of the assignment of error in the circuit court of appeals in this year, 1900, notwithstanding all the active litigation with respect to these warrants, never a word of objection, according even to petitioner, has been raised against the validity of the construction given by all parties to the act No. 16 of 1876, given by every court which has considered it, and apparently given by petitioner's counsel themselves until their assignment of error for the circuit court of appeals.

Is it not rather late to urge a different construction now?

SIXTH. Petitioner, however, objects to the $20,000 of warrants issued, because of diversion by the city of funds derived from collection of assessments to the general fund.

The warrants so objected to are numbered in the list put in evidence by petitioner from 393 to 399, inclusive, and 402, and are for $2,000 each, making sixteen thousand dollars and eight warrants; two warrants, 400 and 401, have been paid (p. 139).

The whole amount of warrants of this kind included in the decree is but $16,000.

Of these one, number 399, is owned by John J. Donaldson, for $2,000 (pp. 132, 133); five, numbered 393, 394, 395, 396, and 397, are owned by Crossly & Son, $10,000 (p. 129); one, number 398, is owned by Mrs. Lytte, $2,000 (p. 131), and one, number 402, is owned by Wilder & Co., $2,000 (p. 130).

These warrants were not part of those, amounting to $300,000, mentioned in the bill of complaint and adjudged to be entitled to payment out of the drainage fund, but they are described in the notarial act annexed to and made part of the bill. The owners, however, intervened under the decree and presented them to the master, and no objection was made to their being presented and considered in this suit, and the question is, therefore, simply, Are they entitled to be paid from the fund?

That one of them is so entitled is beyond question. It is number 402, for $2,000, the last in the list furnished by the city (p. 139), and one of the two sued on by Wilder & Co. and described in the judgment obtained by them in the United States circuit court on the mandate of the United States circuit court of appeals (p. 158).

This judgment settled the principle that these warrants were entitled to be paid out of drainage assessments.

Neither the complainant nor any one coming in under the decree herein objects. The fund is large enough to pay all.

On what ground can the defendant object to a judgment that these warrants shall be paid from the fund when they were issued because of a diversion of that fund, and when but for the settlement by the issue of these warrants, in which way alone, by the provision of section 3 of act No. 16 of 1876, could any settlement be made, the city would have been directed to replace the money diverted?

The issue of the warrants was a settlement made by the notarial act before Le Gardeur (pp. 36 *et seq.*), pursuant to the authority of act No. 16 of 1876, because of a diversion of the drainage-assessment fund, and was found by the master in his supplemental report so to be (p. 107).

SEVENTH. As to the objection that the right, damages, etc., were not appraised, I need but to refer to Mr. De Gray's brief on that point (pp. 30 *et seq.*).

The court will note that by the act No. 16 the council was to provide for the appointment of appraisers, "whose duties and powers shall be specifically assigned in said ordinance."

That ordinance (p. 42) does in terms specifically direct the appraiser to appraise the boats, etc., and to "return a statement of all information in the possession of his office concerning damages claimed" by the ship canal company or its transferee.

Now these claims were against the city or the assessment fund of the city. The means provided for the payment of claims against the public must be assumed to be ample.

The *value* of such claims needs no appraisement. The value depends upon the responsibility of the bidder. The validity of the claim is another question.

As the claims were to be paid only in drainage warrants, and as the fund from which they were payable remained the same, any specific appraisement would be an idle form; the value must be appraised at par.

Their validity and the extent of their validity were for the council and not for the appraiser, and the council, when in full possession of the facts, had all the power and authority necessary or useful for a settlement.

EIGHTH. The judgment should be affirmed.

WHEELER H. PECKHAM.
Of Counsel for Respondents.

26239
Office Supreme Court U.S.
FILED
OCT 8 1900
JAMES H. McKENNEY,
Clerk.

No. 281.

Motion to advance.

United States Supreme Court.

Filed Oct. 8, 1900.

OCTOBER TERM, 1900.

No. 281

CITY OF NEW ORLEANS, APPELLANT,

versus

JOHN G. WARNER ET ALS., APPELLEES.

Now come the appellees in the above entitled cause by their attorneys, and move the court to advance this case, under the 4th clause of Rule 26, for hearing and argument at some early day for the following reasons:

1st. Because this case has heretofore been twice adjudicated by this court on the merits, in the cases of John G. Warner vs. New Orleans, 167 U. S. 467, and of the City of New Orleans vs. John G. Warner, 175 U. S. 120.

2nd. Because the case involves the interpretation and application of the decisions of this court rendered in the above entitled causes.

3rd. Because the delays caused by the several appeals work hardship to the present appellees, whose claims date from June 6,

1876, and have frequently been considered by this court, and were finally adjudicated in New Orleans vs. John G. Warner, 175 U. S. 120.

RICHARD DEGRAY,
J. D. ROUSE,
WM. GRANT,
Attorneys for Appellees.

26240

Supreme Court of the United States.

No. 281.—October Term, 1900.

The City of New Orleans, Petitioner, vs. Ann Warner et al. } On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 28, 1901.]

This was a writ of certiorari to review a decree of the Court of Appeals, rendered May 1, 1900, affirming a decree of the Circuit Court for the Eastern District of Louisiana, rendered March 26, 1900, which overruled certain exceptions of the defendant, the city of New Orleans, to a master's report upon the amounts due under a decree rendered by the Court of Appeals, May 7, 1898, and affirmed by this court January 15, 1900. (175 U. S. 120.)

The decree of the Circuit Court of Appeals, affirmed by this court, contained the following paragraphs:

1. That the city of New Orleans was indebted to John G. Warner in the sum of $6,000 with interest, and that he was entitled to be paid such sum out of the drainage assessments set forth in the bill.

2. That such drainage assessments constituted a trust fund in the hands of the city for the purpose of paying the claims of the complainant and holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of act No. 16 of the legislature of Louisiana, approved February 24, 1876.

3. That it be referred to a master to take and state an account of all said drainage assessments; that warrant holders be entitled to establish their claims before the master without formal interventions or special leave of the court, and that, upon the coming in of his report, complainant and other claimants would be entitled to an absolute decree for the amounts due them, if the fund established by the accounting be sufficient, but if not sufficient to pay such claims in full, then for the proper *pro rata* thereof, &c. The other provisions of the decree are immaterial.

Upon this reference warrants to the amount of $316,000, of a total of $320,000, ($4,000 having been paid,) were presented by different parties, including Warner, and the master found, (1) that all these warrants were "issued to Warner Van Norden, transferee of the Mexican Gulf Ship Canal Company, by the defendant, the city of New Orleans, in payment of the

consideration of the agreement and contract of sale between himself and said city, by act (of sale) . . . dated June 7, 1876, as in said act specified, pursuant to the authority of the act of the legislature of Louisiana, No. 16, dated February 24, 1876, as set forth in the complainant's bill, &c.; . . . that each of said warrants was indorsed in blank by Warner Van Norden, transferee, to whose order they were made payable, and delivered to said claimants, or other parties through whom they have acquired title; and that the said Van Norden has since . . . formally transferred to the complainant, and to all holders of warrants who might intervene in this cause, any and all interest he ever had in said warrants, and subrogated them to all his rights of actions and remedies against the defendant appertaining to the same."

Exceptions were filed to this report upon the ground (1) that the advantages of the decree extended only to such warrants as were issued in payment of the property purchased by the act of sale, which said property as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750; "that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the Circuit Court of Appeals and of the Supreme Court herein; that such balance of said warrants were issued in settlement of a claim for damages urged by the Mississippi and Mexican Gulf Ship Canal Company, and Warner Van Norden, against the city of New Orleans." (2) "That of said warrants the sum of $20,000 were issued, as will appear by the express terms of the act, in payment of work which had been done by said Van Norden, that is, digging canals and building levees, which, at the time of the passage of said act, had not been surveyed or measured by the city surveyor; and hence that as to these warrants there could be no recovery or allowance made."

In a supplemental report upon these exceptions the master found that the city issued warrants Nos. 313 to 392 inclusive, in discharge of the consideration of the agreement of sale passed before Le Gardeur, notary public, amounting to $300,000, and also issued warrants, Nos. 393 to 402 inclusive, aggregating $20,000, not for work, but as a compromise for drainage taxes collected and misappropriated, as stated in the said act of sale.

Mr. Justice Brown delivered the opinion of the Court.

1. The second assignment of error filed in the Circuit Court, adopting the substance of the exceptions to the master's report, raises a distinction between the drainage warrants issued for the purchase of the dredge boats, derricks and other tangible property of the ship canal company, appraised

at $153,750, and such as were issued in the purchase of the franchise and in settlement of the claim for damages urged by the canal company and Van Norden against the city of New Orleans. No such distinction, however, appears in the decree of the Circuit Court of Appeals, affirmed by this court in 175 U. S. 120, which declared that the drainage assessments set forth in the bill should constitute a trust fund in the hands of the city for the purpose of paying the claims of complainant *and other holders of the same class of warrants* issued under the act of sale from Van Norden to the city, and referred the case to a master to state an account of all the drainage assessments, before whom all warrant holders were to be notified to appear and establish their claims, without being required to file intervention or to obtain special leave of the court. Pursuant to this notice the warrant holders did appear and presented their warrants, which were allowed. The decree did not permit of any distinction being made and none was made between warrants issued for the purchase of the property and such as were issued in purchase of the franchise or in settlement of damages, and it is difficult to see in what respect the master or the court departed from the decree of this court.

As the bill was brought by Warner on his own behalf, as well as on behalf of all other parties holding obligations of the same nature and kind, there was no error in permitting all such parties to come in and prove their claims without formal interventions or special leave. All the warrants allowed belonged to the same class as Warner's, and were issued upon the same consideration. This is the method commonly resorted to in bills for the foreclosure of railway mortgages, or other securities, under which bonds have been issued and are widely scattered in the hands of holders, many of whom are unknown and impossible to ascertain except by advertisement. In cases of this character decrees are treated as decrees in favor of all in like situation as the plaintiff who come in and claim the benefit of them. (*Richmond* v. *Irons*, 121 U. S. 27; *Brooks* v. *Gibbons*, 4 Paige, 374; *Thompson* v. *Brown*, 4 Johns. Ch. 619; *Hammond* v. *Hammond*, 2 Bland. 362.)

Doubtless the validity of these claims in the hands of holders may be examined, except so far as such validity has been already settled by the decree; but where the master upon the reference has followed the decree and enforced its directions, no objection can be taken upon appeal as to what he has done, when the appeal arises upon exceptions to his report. (*New Orleans* v. *Gaines*, 15 Wall. 624.) The master was powerless to entertain any objection to the decree or any proposal for its modification. His duty was simply to carry it out according to its terms.

It should be stated in this connection that no such distinction between the different classes of warrants as is now made was called to the attention

of this court when the case was here upon questions certified, (167 U. S. 467,) or upon the merits, (175 U. S. 120.) In fact, the present exceptions to the master's report obviously involve an attempt to set up a new defense as to a part of these warrants, after the merits of the case have been fully considered and disposed of. This is impossible. (*Yazoo, &c. R. R. Co.* v. *Adams, ante,* p. ——; *Supervisors* v. *Kennicott,* 94 U. S. 498.)

But considering the question to be still an open one, and that we are at liberty to inquire whether the court exceeded its authority in decreeing the payment of these warrants, without reference to whether they were given for the purchase of the property or franchises, or the settlement of damages, the result would not be different. It was evident there had been a claim for damages pending a long time against the city. By the act of February 24, 1871, "to provide for the drainage of New Orleans," the former boards of drainage commissioners were abolished, and their assets transferred to a board of administrators, who were "subrogated to all the rights, powers and facilities" possessed by the commissioners. The ship canal company was authorized to undertake the work of draining the city, and by section 6, it was made the duty of the board of administrators "to locate the lines of the canals and protection levees, specified in the various sections of this act, in time to prevent delay in the prosecution of the work of the said company. . . . And should the city council fail to locate the lines of said canal and protection levees above specified, the city of New Orleans is hereby made liable to the said company for the *damages* resulting from such delay."

By the act of February 24, 1876, authorizing the city to control its own drainage and to purchase the property of the ship canal company, the common council was empowered "to transact and contract" with the ship canal company, and its transferee, "for the purchase and settlement of all or any rights, franchises and privileges created, authorized or arising in favor of said company or said transferee under and by virtue of Act No. 30, of Acts of 1871; also, for the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats and apparatus belonging to said company or its transferee," &c. It will be observed that the city is invested with a double power: First, to *transact* and contract for the purchase and *settlement* of any rights, franchises, privileges, &c., and the other for the purchase and transfer of the dredging plant. The word "transact," which seems ambiguous here, is explained by Article No. 3071 of the Civil Code of Louisiana, which defines "a transaction or compromise" to be "an agreement between two or more persons, who, for the purpose of preventing or putting an end to a law suit, adjust their differences by mutual consent." By the second clause of the section the purchase and transfer of the dredging plant was authorized.

Pursuant to this act the city surveyor was authorized by ordinance of April 26, 1876, to examine the condition and value of the dredging plant, making a report to the committee of the whole, "together with a statement of all information in the possession of his office concerning *damages* claimed by said . . . canal company, or transferee thereof." In compliance with this ordinance he appraised the value of the dredging plant at $153,750, and stated that the damages claimed by the transferee were for delays at various times and places, and further stated that he was unable to arrive at a conclusion as to their amount, and did not feel called upon to express an opinion; but that he had no doubt the committee, from the facts stated, would be able to arrive at a just and satisfactory conclusion. This left the common council free to settle for the damages without an appraisement. Under these circumstances the failure to appraise the damages would not vitiate their settlement.

By a further ordinance, adopted May 26, 1876, the mayor was authorized to enter into an agreement with the canal company for the purchase of its plant, and "also for the full settlement of all claims for damages, and to secure the absolute sale, relinquishment and transfer to the city of New Orleans of all rights, privileges and franchises," &c., and upon the execution of the agreement to draw upon the administrator of finance for the sum of $300,000 in drainage warrants, in full settlement, as above provided.

Conceding that the power given by the act of 1876 to transact and contract with the canal company for the purchase and settlement of all or any *rights*, franchises and privileges, is somewhat ambiguous as the source of a power to compromise for *damages*, the practical construction put upon that act by the ordinances of April 26 and May 26, 1876, as including claims for damages, is entitled to great weight, particularly in view of the long subsequent acquiescence of the city in that construction.

By the act of sale executed June 7, 1876, the canal company transferred its dredging plant to the city, as well as its franchises, privileges, contracts and advantages, and subrogated the city to all its rights, actions and remedies, in consideration of the sum of $300,000; and the president and secretary of the canal company, and Van Norden, their transferee, also agreed that the above amount should be in full settlement of "all existing claims for damages" which either of them "ever had, or have now, or may have against the said city of New Orleans."

It is difficult to see how the intention of the city to settle all these claims could be made clearer, or the terms of the actual settlement more sweeping than they were by these proceedings. What the items of damages were does not appear. As to what influences were brought to bear upon the common council to induce it to pay so large a sum as $146,250 for these damages, we are equally in the dark. Certainly we are not at liberty to

impute corrupt motives to the council. The arrangement may have been an unfortunate one, but the arrangement as made is beyond doubt.

It is obviously impossible to distinguish as between these warrants, and to say that such were issued in payment of the plant, and such others for the purchase of franchises and in settlement of the damages. Granting the position taken by the city to be correct, it would result that all the warrants must be scaled down *pro rata* in the proportion of about fifty per cent., which would obviously be unfair to those who received purchase warrants, or there must be some attempt to classify these warrants. But as the warrants were all alike in form, no such classification is possible. It is suggested by the city that it must be considered that the warrants were issued and applied in the numerical order of their execution: First, for the payment of the price of the property purchased; next, for the claim for the settlement of damages; and lastly, for the payment of work mentioned in the said notarial act. But this would result in the rejection of the Warner warrants, which were expressly allowed by the decree of this court to the amount of $6,000, since it appears by the report of the master that the warrants issued to Warner and allowed by such decree were Nos. 379, 380 and 381, and did not fall among the first $153,750 issued, but were payable long after this amount, appraised as the value of the plant, had been exhausted. It would also result in the disallowance of certain warrants to Wilder & Company, upon which a judgment at law was recovered on May 24, 1898, after the case had been remanded from the Circuit Court of Appeals. Obviously the position of the city in respect to these warrants is untenable.

2. The only other item to which exception is taken is one of $20,000, for which warrants Nos. 392 to 402, inclusive, were issued as a compromise of drainage taxes collected by the city and misappropriated. These were in excess of the $300,000 allowed in payment of the plant and various claims of the canal company, and were especially provided for in the act of sale as follows: "That inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of $20,000 in drainage warrants in full satisfaction of the same."

The authority to include this in the act of sale is questioned by the city, but we think it comes within the first section of the act of 1876, which provides for "the purchase and settlement of all or any *rights* . . . arising in favor of said ship canal company, or said transferee," under the act of 1871, and within the ordinance of May 26, to which allusion has already been made, which provides for "the full settlement of all claims for damages and to secure the absolute sale, relinquishment and transfer

26243

to the city of New Orleans of all *rights* . . . arising in favor of the canal company." Money collected by the city, applicable to the drainage funds, and appropriated to the general funds of the city, manifestly create a *right* in favor of the canal company to a restoration of the amount. If there were doubt of the proper construction of these words the long acquiescence of the city and the failure to raise an objection to this claim until after final decree is sufficient to put the matter at rest.

The decree of the Circuit Court of Appeals is

Affirmed.

Mr. Justice WHITE and Mr. Justice PECKHAM took no part in this case.

True copy.

Test:

Clerk Supreme Court, U. S.